United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
Ira M. Millstein

75-5024

United States Court of Appeals

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For the Second Circuit

Docket No. 75-5024

P/S

Harvey R. Miller, as Trustee in Bankruptcy of Ira Haupt & Co., a Limited Partnership, Bankrupt,

Plaintiff-Appellant,

—against—

New York Produce Exchange *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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Preliminary Statement

This is an appeal from a judgment in favor of defendants, dated December 4, 1975, as finalized by the Final Judgment dated January 30, 1976, entered after a trial on the issue of liability in the United States District Court for the Southern District of New York (Hon. Robert L. Carter presiding). The lawsuit was commenced by plaintiff-appellant, the Trustee in Bankruptcy of Ira Haupt & Co. ("the Trustee"), to recover approximately $12,000,000 which Ira Haupt & Co. ("Haupt"), a brokerage concern, lost directly as a result of defendants' failure to properly discharge their duty to regulate trading of cottonseed oil

futures contracts during 1963. Defendants-appellees include the New York Produce Exchange ("Produce Exchange"), the commodity market on which such futures contracts were traded,* certain members of its governing board, and certain companies represented on the board which profited directly from defendants' improper regulation.

From time to time in this brief, defendants will be referred to as "trader-regulators," meaning that the individual defendants or their respective companies were all engaged in the relevant trade—*i.e.*, the business of buying or selling, as principal or broker, vegetable oil futures contracts and/or cash vegetable oils as to which such futures contracts are traded. No one of them was not so engaged and, hence, no one of them was free from the inherent conflict of wearing two hats—one as a regulator and the other as a businessman involved in the trade being "regulated."

The Trustee contended at trial that defendants failed to properly discharge their regulatory responsibilities under the Commodity Exchange Act of 1936, as amended, 7 U.S.C. § 1 *et seq.* (the "Act"), by knowingly, recklessly or, at the very least, negligently permitting Anthony DeAngelis ("DeAngelis") and his controlled corporation, Allied Crude Vegetable Oil Refining Corp. ("Allied")** to engage in activities which constituted a manipulation and threatened

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* A futures contract is an agreement between a seller (the "short") and a buyer (the "long") to transfer a specific quantity and quality of a specific commodity at a designated month in the future (JA 203a). For the convenience of the Court, we have annexed hereto as Appendix I a short description of the operation of the commodity futures markets.

** Throughout this brief, Allied and DeAngelis are referred to interchangeably.

orderly marketing conditions in cottonseed oil futures trading on the Produce Exchange (Count I). The Trustee further contended that defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1, in that their acts and failures to act were taken in furtherance of their own self-interest, in bad faith and in a fundamentally unfair manner, enabling them to profit unjustly at the expense of Haupt (Count II).

Following a jury trial at which the District Court improperly directed verdicts on critical issues, made many erroneous and highly prejudicial rulings, and incorrectly instructed the jury—all of which deprived the Trustee of his right to a fair trial, the jury returned a verdict for the defendants.

Issues Presented

1. Did the District Court improperly deprive the jury of the opportunity to weigh the evidence presented and to determine for itself whether or not defendant trader-regulators acted in bad faith when they purported to regulate the Produce Exchange during 1963? (Point I pp. 44-51 *infra.*)

2. Did the District Court improperly exclude significant evidence of both Allied's manipulative activities and defendants' self-interest as traders, which self-interest caused defendants as regulators to act in a fundamentally unfair manner? (Point II pp. 52-66 *infra.*)

3. Did the District Court improperly admit into evidence on a central issue in the case, without any supporting testimony whatsoever, an unsigned, undated government report containing multiple hearsay and opinions of unknown authorship? (Point III pp. 67-83 *infra.*)

4. Did the District Court commit reversible error (a) by failing to instruct the jury not to consider Haupt's alleged contributory negligence; (b) by refusing to instruct the jury to consider whether defendants acted recklessly, thereby making Haupt's alleged contributory negligence irrelevant; (c) by failing properly to instruct the jury on the standards for imputing contributory negligence to Haupt; (d) by improperly instructing the jury that defendants could only be found liable if the actions they took in an emergency of their own making were patently unreasonable; and (e) by failing to instruct the jury that inaction by any governmental authority concerning DeAngelis' activities was not a defense to this action? (Point IV pp. 83-95 *infra.*)

5. Did the District Court improperly direct a verdict in favor of the corporate defendants? (Point V pp. 95-99 *infra.*)

Statement of the Case

This case arises out of one of the most notorious commercial and financial disasters in American history—the so-called great salad oil swindle perpetrated by DeAngelis through Allied and other controlled corporations in the fats and oils business. *See* N. Miller, The Great Salad Oil Swindle (1965). Specifically, it involves the role played by the Produce Exchange and defendant trader-regulators as Allied's trading activities created artificial price levels, disrupted orderly marketing and otherwise had an unhealthy effect on the market whose integrity defendants were required by law to preserve.*

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* 7 U.S.C. §§ 5, 7(d); *see* H.R. Rep. No. 421, 74th Cong., 1 Sess. 1 (1935). Defendants herein are the Produce Exchange, those members of its Board of Managers ("Board") who also served as its

The nature of the Trustee's case below consisted of evidence establishing: (a) the existence of a manipulation, a threat to orderly marketing and other conditions which the trader-regulators were required by law to prevent; (b) that the trader-regulators were aware of these conditions; (c) that they failed to prevent their occurrence or to take proper action when confronted with the consequences of their prior regulatory failures; and (d) that the trader-regulators' acts and failures to act were motivated by self-interest and were taken in bad faith and in a fundamentally unfair manner.

As to each of the foregoing elements, the Trial Court committed serious and highly prejudicial errors by taking issues away from the jury, by unduly limiting the scope of the Trustee's proof, by improperly admitting an unreliable and undocumented report highly prejudicial to the Trustee's position, and by improperly charging the jury.

Among the most serious errors committed by the District Court, and that which for all practical purposes destroyed the Trustee's case, was to take away from the jury the issue of the trader-regulators' motivation and intent in failing to halt Allied's improper trading activities and in refusing to close the market to prevent profiteering until it was in their own financial interest to do so. The effect of this ruling was to dismiss the antitrust claim and to limit the jury's consideration of the Commodity Exchange Act claim

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Executive Committee during 1963, and the companies which such individuals represented: Walter C. Klein ("Klein") representing Bunge Corporation ("Bunge"); Harold H. Vogel ("Vogel") representing Continental Grain Company ("Continental"); Harry B. Anderson ("Anderson") representing Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"); Sidney Fashena ("Fashena") representing I. Usiskin & Co. ("Usiskin"); and, Donald V. MacDonald ("MacDonald").

to negligence.* The District Judge thereby usurped the jury's prerogatives, passed upon the credibility of witnesses, resolved substantial questions of fact and decided for himself that defendants had not acted in bad faith during 1963--an issue which was required by the state of the record to be submitted to the jury.

The District Court compounded this essential error by improperly excluding substantial evidence relating to the issue of bad faith, such as: (a) the full extent of the profits made by certain of the trader-regulators during the market collapse in November 1963; (b) the improper use of inside information by certain of the trader-regulators; (c) participation in and profits made by certain of the trader-regulators in related vegetable oil transactions showing their knowledge of and financial interest in Allied's market manipulation; (d) knowledge by Klein and Bunge of the issuance by DeAngelis of false warehouse receipts and their willingness to help Allied conceal this information to further their own pecuniary interests; and (e) institution of safeguards by Bunge and Continental, in their role as traders, to protect themselves in the event of Allied's failure, without urging comparable safeguards in their role as regulators.

The Court also improperly excluded evidence relating to the characterization of Allied's activities, their disruptive effect on the market and defendants' knowledge thereof. Specifically, the Court unduly restricted the testimony of plaintiff's experts—Professors Reynold P. Dahl and Roger W. Gray, excluded exhibits showing market information available to the trader-regulators, and refused to allow the testimony of two key witnesses—Robert L. Raclin and Perry

* The District Court also improperly directed a verdict in favor of the corporate defendants, leaving for the jury's consideration only a skeletal claim against the Produce Exchange and the individual defendants.

Moore—who would have confirmed that the market was unhealthy, that prices were manipulated, that it was common knowledge that Allied was the cause of the problem, and that appropriate regulatory action mandated that steps be taken to halt Allied's improper activities.

Having emasculated the Trustee's affirmative case and having improperly limited plaintiff's evidence, the Court proceeded to admit an unsigned, undated, highly prejudicial report from an unknown author indicated as having been a CEA* document, which opined that DeAngelis' activities did not constitute a price manipulation or otherwise improperly affect the market. This report was admitted into evidence (1) without affording the Trustee the right to examine the author of the report or anyone else connected with its preparation; (2) despite the fact that the report was filled with speculative and unqualified opinions and conclusions; (3) over the Trustee's strenuous objection that the report was an after-the-fact, self-serving declaration prepared under suspicious circumstances; (4) despite the fact that it had not been produced by the CEA in response to a Court order requiring the CEA to turn over to the Trustee documents relating to DeAngelis; and (5) notwithstanding that it relied heavily in its conclusions upon events in the soybean oil futures market, an area of proof ruled irrelevant by the Trial Court with respect to the Trustee's affirmative case.

This report, which purportedly represented the opinion of an impartial government agency on an essential issue in this case, must have had a devastating impact on plaintiff's case in the eyes of the jury. This impact was intensified by the Court's refusal to charge that the defendants

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* The CEA was an agency within the Department of Agriculture responsible for overseeing the contract markets. General Accounting Office, Report to the Congress: Improvement Needed in Regulation of Commodity Futures Trading 1 (1975).

had the primary responsibility to regulate the Produce Exchange and could not, as a matter of law, rely upon the government's inaction to justify their own failures.

For these reasons, the improper admission of this single piece of evidence, in and of itself, constitutes reversible error.

After surgically dismembering the Trustee's case, and after improperly admitting the prejudicial report, the District Court sent to the jury only the question whether defendants negligently failed to properly regulate the Produce Exchange during 1963. But even then, the Court improperly charged the jury with respect to the circumstances under which liability could be imposed, and thereby substantially impaired the jury's ability to reach a verdict for the plaintiff.

Thus, the Court erroneously charged the jury on a number of significant issues. The Court should have instructed the jury that, in light of defendants' overriding statutory duty to protect the public interest, Haupt's alleged contributory negligence was irrelevant; it did not. The Court should have instructed the jury to consider whether defendants' conduct was reckless and, if so, then to disregard Haupt's alleged contributory negligence; it did not. The Court should have properly defined scope of authority when it instructed the jury that they could find Haupt to be contributorily negligent if they found that Haupt's employee acted negligently; it did not. The Court should *not* have instructed the jury that defendants could only be held liable for their conduct during the November 14-20 period if their actions were "patently unreasonable"; it did so.

The Court's errors in its charge were compounded when it submitted to the jury, on the second day of its deliberations, a form of special verdict which re-emphasized the

erroneous portions of the Court's charge, and which was highly prejudicial in form, emphasizing in block capitals the defendants' position while minimizing the contentions of the Trustee (Ct. Ex. 4). This special verdict had previously been withheld in the face of plaintiff's objections and defendants' concurrence (JA 2121a-22a);* it was only given to the jury when, after the jury had been out over night, defendants changed their minds and requested its submission (JA 2124a-29a, 2130a). This, of course, wholly confused the jury; they did not even fill out the special verdict (JA 2133a-2139a).

The District Court's rulings denied plaintiff a fair trial. Individually, each of these rulings severely prejudiced the Trustee's case; taken together, they effectively destroyed it. Therefore, the Trustee requests this Court to reverse the judgment below and grant him a new trial in this action.

Facts

The Trustee introduced a host of facts, and proffered still others, demonstrating the four essential elements leading inexorably to defendants' culpability herein: (1) DeAngelis' activities constituted a manipulation and threatened orderly marketing; (2) the trader-regulators knew or should have known of DeAngelis' activities and their consequences; (3) the trader-regulators failed to prevent De-

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* Numbers in parentheses preceded by the designation "JA" refer to pages reproduced in the first four volumes of the Joint Appendix.

Numbers in parentheses preceded by the designations "Pl. Ex.", "Def. Ex.", and "Ct. Ex." refer respectively to Plaintiff's, Defendants' and Court's Exhibits offered and/or introduced below. All non-bulky exhibits relied upon on this appeal have been reproduced in three separately bound volumes marked "Joint Appendix—Exhibits".

The designations "Tr." and "R." refer respectively to certain additional pages of the Trial Transcript and portions of the Record on Appeal, relied upon but not included in the Joint Appendix.

Angelis' improper activities or to take proper action when confronted with the consequences of their prior regulatory failures; and (4) the trader-regulators, in purporting to regulate, were motivated by self-interest and bad faith, and behaved in a fundamentally unfair manner.

We most respectfully submit that the Trustee was deprived of a fair jury trial by virtue of the rulings and instructions of the District Court briefly described above and discussed in detail in the Argument below. Herein we shall describe the facts as they should have been presented to the jury, absent the District Court's errors. This recitation will demonstrate that, at the very least, all of the Trustee's case should have gone to the jury, not solely the mangled portions remaining after evisceration by the District Court.

We shall discuss the facts in the following order: (a) Allied and its financial predicament; (b) Allied's activities and their impact on the market; (c) the trader-regulators' knowledge of Allied's activities and their consequences based upon (1) publicly available information and (2) their dealings with Allied; and (d) the trader-regulators' regulatory responsibilities and failures (1) pre-November 14, 1963 and (2) post-November 14, 1963.

A. *Allied and its Financial Predicament*

DeAngelis was President of Allied from 1954 to 1963 (Tr. 2751). Allied was in the business of processing, refining and shipping fats and oils, including cottonseed oil and soybean oil (JA 1025a-26a). In conjunction therewith, Allied traded cottonseed oil and soybean oil futures contracts on the Produce Exchange and the Chicago Board of Trade ("Board of Trade") respectively. Primarily, Allied purchased crude cottonseed oil and soybean oil, refined the oil at its facility in Bayonne, New Jersey, and exported it—

usually by selling it to an exporter such as Continental or Bunge (JA 1027a). In connection therewith, Allied had highly unusual and extensive dealings in cash vegetable oils and in futures with Continental and Bunge—which dealings were extraordinarily lucrative to the latter companies. In addition, Bunge and Continental earned extraordinary profits by providing financing to Allied (see pp. 22-25 *infra*).

Allied began to suffer financial reverses following its loss of approximately $4,000,000 on a deal with the Spanish Government in 1959 (JA 1046a). Thereafter, Allied was financially unstable; by 1963 its plight grew increasingly desperate (JA 1046a-47a, 1051a, 1054a, 1061a-63a). DeAngelis therefore devised various schemes to remain afloat, in both the cash and futures market where prices move in a parallel fashion: These included the issuance of warehouse receipts representing non-existent vegetable oil to secure additional loans (JA 1046a-47a);* and, in the futures market, the constant effort to maintain futures prices at an artificially high level in order to prevent calls, which Allied could not meet, for additional collateral on loans against the value of its cash oil, and for margin based upon the declining value of its futures position (JA 1061a-63a)** (see pp. 12-15 *infra*).

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* By the time of Allied's collapse in November 1963, there were more than $100,000,000 of worthless receipts outstanding. See N. Miller, The Great Salad Oil Swindle, *supra* at 245. In addition, in the fall of 1963, DeAngelis stole a pad of American Express field warehouse receipts, forged the signatures on them and issued them to companies, including Haupt, in return for loans (JA 1046a-47a). Such action was eminently foreseeable to defendants Klein and Bunge as a result of their involvement in a similar Allied fraud in September 1962 (see discussion of Harbor Tank incident pp. 25-27, 54-57 *infra*).

** Since the movement of cash and futures prices are interrelated, a decline in the price of futures would likely result in a decline in the price of cash oil, or vice-versa. See Appendix I *infra*.

Allied soon found itself in an increasingly vicious cycle: First it had to borrow money to buy futures contracts and pay for deliveries to support the market price and preserve the value of its inventory (JA 1050a-51a); then Allied had to borrow more money to pay off its maturing debts. The larger Allied's position grew, the more costly it became to maintain. Finally, Allied's position reached an unprecedented 90% of the outstanding long position in cottonseed oil futures (10,273 out of 11,309 contracts) (Pl. Ex. 133),* at a time when the total number of outstanding cottonseed oil futures contracts was extremely high (Pl. Ex. 9e). In addition, Allied also accumulated 40% of the much greater number of outstanding long soybean oil contracts (JA 1055a).

B. *Allied's Activities and Their Impact on the Market*

Commencing in early 1963, and as a result of defendants' failure to regulate the market in good faith, Allied was able to manipulate the price of cottonseed oil futures on the Produce Exchange and to accumulate an extraordinary and unprecedented 90% of the long side of the market. These activities by Allied created a highly unstable and disorder[illegible] market; a market characterized by artificially high prices which did not reflect true conditions of supply and demand; a market where the normal price relationship between cash oil and futures was disrupted; a market whose stability was dependent upon the integrity and financial resources of an individual known to be in dire financial straits; a market which everyone but Allied was betting

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* By August, 1963 Allied was the buyer or "long" on 50% of all outstanding futures contracts traded on the Produce Exchange; by November, Allied's long position had increased to 90% (Pl. Ex. 133).

would collapse; and a market which, left to its own momentum, was predestined to collapse to the benefit of the trader-regulators and their customers.

Plaintiff's experts testified that Allied's activities in cottonseed oil futures constituted a manipulation and threatened orderly marketing conditions on the Produce Exchange (JA 1642a, 2002a-06a). Defendant Anderson agreed (JA 1254a-56a). Allied's continuous purchase of futures contracts created the aura of legitimate demand and thereby increased futures prices (JA 1[illegible]a-06a, 1673a-74a). Absent such support by Allied, the price of vegetable oil futures would have fallen (JA 1051a, 1088a).

Allied's efforts in 1963 to push cottonseed oil futures prices to an artificially high level and maintain them there constituted a price manipulation, because they had the purpose and the effect of creating higher prices than was warranted by legitimate market demand (JA 1050a-51a, 1088a, 1132a, 1168a, 1326a-27a, 1636a-40a, 2007a-08a). DeAngelis had no valid business reason for his huge futures position; he only wanted to affect prices (JA 1050a-51a, 1088a). Further, the immense size of his position gravely threatened orderly marketing conditions and prevented futures trading from proceeding in a manner reflecting true supply and demand (JA 1636a, 1669a-71a). The whole texture and character of the market changed as a result of Allied's vast position. Eventually it totally disrupted the operation of the free market.

DeAngelis accomplished this price manipulation through a series of steps and transactions that included:

(a) buying huge numbers of futures contracts that Allied could not pay for and did not need for any legitimate business purpose in order to maintain prices at an artificially high level (JA 1051a-55a, 1113a);

(b) placing buy orders at or near the market close, at the end of a trading day, specifically to move the settlement price up a few points in order to support and sustain market prices (JA 438a-39a, 1132a, 1673a-74a); and

(c) engaging in a series of ex-pit loan transactions disguised as sales (JA 1123a, 1135a-36a, 1669a-71a) in order to maintain his growing long position.* The funds obtained in this manner were used by Allied to "stop" (accept and pay for) registered warehouse receipts tendered for delivery against Allied's long position. These receipts represented oil which Allied did not need and could not otherwise afford. This postponed the day of reckoning when Allied would have to reduce its long position by selling futures contracts, thereby causing market prices to decline (JA 1095a).** A variation of this scheme, somewhat akin to "kiting" of checks, involved rolling Allied's futures position forward to a more distant month, using a back-to-back series of ex-pit transactions. These transactions not only violated the Rules of the Produce Exchange; they also had a churning effect on the market by giving an

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* A detailed description of the ex-pit registered warehouse receipt financing transactions, including the background and operation of this Allied scheme, is set forth in Appendix II to this brief. Because Rule 6-B of the Produce Exchange Rules (Pl. Ex. 56) permitted ex-pit trading only in connection with a cash sale of oil between the parties, Allied and its lenders engaged in a charade whereby the pledge of warehouse receipts by Allied was called a "sale" despite the fact that Allied agreed to repay the loan and take back the receipts prior to the next delivery month. Since these were in reality financing transactions, Professor Gray, a consultant to the Commodity Futures Trading Commission ("CFTC"), concluded that these were not bona fide cash transactions and therefore did not fall within the purpose and scope of Rule 6-B (JA 1657a-59a, 1662a-63a. *See also* Def. Ex. 211 id., pp. 48-49—this exhibit was improperly excluded, see footnote (***) pp. 82-83 *infra*).

** As in any public market, the sale at public outcry within a short period of time of a substantial percentage of the outstanding position would have a serious depressing effect on prices. See Appendix II.

artificial appearance of increased demand, which also tended to inflate the price of futures.* Among others, defendants Bunge, Continental and Merrill Lynch, as their broker, participated in this scheme.**

The huge concentration accumulated by DeAngelis in the course of his manipulation was, in and of itself, a serious threat to orderly marketing conditions (JA 1675a). It placed in the hands of a single interest the power to affect market prices at will and made the entire financial stability of the market dependent upon the stability of that one interest (JA 1985a-86a). This danger was exacerbated when the dominant interest was speculating rather than hedging, as in the case of Allied (JA 1055a), and when the other side of the market also became increasingly concentrated and more speculative (Pl. Ex. 124). As DeAngelis himself testified, Allied's position became so huge and so concentrated that a drop of one cent in futures prices meant a loss to Allied of $20 million in variation margin (JA 1052a-54a).*** It was only a matter of time until the inevitable occurred. When DeAngelis could no longer support the market, the price of cottonseed oil was sold down (JA 441a, 1088a) and Allied declared bankruptcy (JA 1054a, 1094a-95a).

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* Thus, 500 contracts involved in two ex-pit transactions comprising a roll-over would be reported as trades involving 1,000 futures contracts and equivalent amounts of cash oil. In fact, however, no cash oil would actually change hands, and an artificial picture of market activity and market interest would thereby be created (JA 1083a-85a, 1144a-47a; *see* Def. Ex. 211 id., pp. 18, 48-49).

** As part of this scheme, Allied engaged in these ex-pit registered warehouse receipt financing transactions to maintain its soybean oil position and thereby support soybean oil prices which move parallel with cottonseed oil prices. Even though the defendants engaged in these soybean oil transactions with Allied which, together with the cottonseed oil transactions, formed a complete pattern of market manipulation, the District Court excluded most of the evidence relating to soybean oil (see Point II pp. 52-54 *infra*).

*** The terms "hedging," "speculating" and "margin" are explained in Appendix I.

C. *The Trader-Regulators' Knowledge of Allied's Activities and Their Consequences*

There was no dark mystery as to what was going on in the futures market during 1963. Defendants had to be aware, both as traders and regulators, of the most unusual and highly peculiar market conditions on the Produce Exchange and had to know that the market was unstable and that futures prices were artificially high.

Not only was there an extraordinary concentration (90%) on the long side of the market in the hands of Allied (Pl. Ex. 133), and not only had volume of trading and the number of outstanding futures contracts increased dramatically (Pl. Exs. 122, 123), but every other market indicator signalled openly that there was a manipulation under way, and that a disorderly market existed (*see, e.g.*, Pl. Exs. 124-126). Defendant MacDonald, President of the Produce Exchange, stated at the Board meeting of November 14, 1963 that the "old time traders have never seen anything like this before" (JA 574a-75a; Pl. Ex. 12h id.).

Further, by virtue of their extensive business dealings with Allied, traders Bunge, Continental and Merrill Lynch knew that Allied's ex-pit registered warehouse receipt financing transactions were designed to maintain cottonseed oil futures prices at an artificially high level, and also knew that Allied could not long continue to support the market.*

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* As the Appellate Division noted in *Bunge Corp.* v. *Manufacturers Hanover Trust Co.*, 37 App. Div. 2d 409, 415 (1st Dep't 1971), *aff'd*, 31 N.Y.2d 223 (1972):

> the registered warehouse receipt transactions, including those in suit herein, were meaningless except as an attempt to manipulate the market in the vegetable oil products involved. [Bunge's] stance that it was unaware of the illegal nature of

1. *Publicly Available Information*

In brief, the pertinent market indicators showed that market conditions were highly unusual and that something was awry.

*Volume of Trading:** During 1963, volume of trading on the Produce Exchange increased substantially in comparison to prior years, particularly during the summer months (Pl. Ex. 122). Much of this increased volume resulted from an unusually high number of type 6-B ex-pit trades (JA 363a-65a).

*Size of Open Interest:*** The open interest also increased substantially in size during 1963 (Pl. Ex. 123). Increasing open interest in light of the high number of type 6-B ex-pit transactions was unusual (JA 365a-67a).

Distribution of Open Interest: Between the months of March and July of 1963, there was a sharp and unusual increase in the concentration of the open position on the long side of the cottonseed oil futures market in the hands of large traders (JA 366a-67a)—the percentage increased from approximately 10% at the end of March to 70% at the end of July, 1963 (JA 1691a; Pl. Exs. 10 [c] and 10 [g]). Thereafter it increased to 94.9% (Pl. Ex. 124).

While not quite as dramatic—since it was already highly concentrated—there was during 1963 a substantial increase in the concentration of the short position held

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Allied's activities seems incredible in view of its deep involvement with Allied to the tune of many millions of dollars.

The same reasoning applies to defendants Continental and Merrill Lynch.

* Volume of trading is the number of contracts bought and sold in a given period of time (JA 210a).

** Open interest refers to the number of outstanding contracts held by all traders at the end of the day (one side only—either all longs or all shorts) (JA 211a).

by large traders (86%-95%) (Pl. Ex. 124). Further, there was an increase in the speculative short position (Pl. Ex. 124).

These statistics indicated that the market was becoming increasingly dominated by large interests long and short, with the latter speculating that the price would soon fall (JA 1766a). They also indicated that there was a growing market power on both sides of the market capable of causing severe disruptions.

*Contracts Settled by Delivery After First Notice Day:** There was a marked increase in the number of contracts settled by delivery after first notice day during 1963. In fact, the number of contracts settled by deliveries during the Spring of 1963 was more than double that in 1962 (JA 368a-69a; Pl. Ex. 125). These increased deliveries presented yet another signal of a distorted market (*see* JA 1696a).

Normally, futures contracts are settled by the purchase of an offsetting contract; deliveries are taken infrequently (JA 219a-21a, 323a; Pl. Ex. 9e). When increased deliveries are being made on an exchange, this indicates a disruption of the normal relationship between cash and futures prices. (JA 271a, 1695a-98a). This is precisely what occurred in 1963 when DeAngelis' activities caused futures prices to increase to an artificially high level (JA 2007a-08a) making it cheaper for the shorts to deliver cash oil than to purchase an offsetting futures contract (JA 973a; *see* JA 1695a-98a). Indeed, so profitable was this delivery device that there were

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* Contracts are settled by delivery when the holder of a short position elects to give notice of his intention to make delivery in satisfaction of his obligation under a futures contract. The "first notice day" for the shorts to announce their delivery intentions generally occurs around the 26th day of the calendar month preceding the delivery month in question (see Pl. Ex. 56, Rule 52). See Appendix I.

a substantial number of applications made to the Produce Exchange for approval of additional warehouse space from which delivery could be made (JA 1184a), yet another indication that the price of futures was artificially high as a result of Allied's activities.

*Ex-Pit Transactions:** During 1963, the number of futures contracts transferred in ex-pit transactions was astronomically high relative to previous years (JA 341a-42a, 369a-70a). Thus, in 1961 a total of 504 contracts were reported as type 6-B ex-pit trades; during 1962, 434 contracts; and, incredibly, during 1963, 35,438 contracts were reported as type 6-B ex-pit trades (JA 369a-70a; Pl. Ex. 126). These private ex-pit trades kept prices from falling and thereby assisted DeAngelis to maintain prices at an artificially high level. Having such price effect, they were inconsistent with the Act which is designed to ensure that futures prices are determined at a public auction and reflect true conditions of supply and demand (Pl. Ex. 56, Rule 6). This extraordinary volume of ex-pits, standing alone, indicated that something was wrong with the market (JA 1692a); as indeed there was.

The warning signs discussed above were well known to the trade in 1963. Defendant MacDonald knew there was a "record volume" (JA 511a-12a); so did Fashena (JA 899a) and Anderson (JA 1178a-79a). The trader-regulators were also aware of the increasing deliveries and the unusual quantity of ex-pit trading (JA 435a, 514a, 901a-04a, 1180a-82a, 1191a, 1380a). MacDonald, Berg and Fashena were specifically warned by the Clearing Association** of the dan-

* For a discussion of the role of ex-pit trading on an exchange see Appendix I *infra*.

** The New York Produce Exchange Clearing Association (the "Clearing Association") was the organization that cleared all contracts—*i.e.*, assumed the obligations and succeeded to the rights of both parties to the contract—traded on the Produce Exchange during 1963. See Appendix I *infra*.

gers presented by the increasing concentration and ex-pit trading (JA 922a; Pl. Exs. 27, 28). Berg also had a number of conversations with T. Reed McMinn of the regional office of the CEA regarding the unusual trades involving Allied (JA 854a-65a; Pl. Ex. 41). In fact, McMinn questioned the very first substantial ex-pit trade between Allied and Bunge consummated as part of the ex-pit registered warehouse receipt financing transactions by which means Allied manipulated futures prices (JA 866a; Pl. Ex. 41).* Finally, by the Fall of 1963, the outstanding registered warehouse receipts had moved around so many times that the warehousemen could no longer keep track of who was holding them (JA 1186a). At their request, the Produce Exchange called in all the receipts for re-validation (JA 1185a), something which had never been done before (JA 625a).

Beyond what was admitted by the defendants at trial, the warning signs were matters of public record. The Produce Exchange, like all commodity markets, kept records of the volume of trading, the open interest, volume of deliveries and ex-pits (JA 265a, 699a, 732a; Pl. Exs. 122, 123, 125, 126). Deliveries and ex-pit trades were posted on the Exchange board daily (JA 419a-20a, 440a, 732a, 809a). In addition, the CEA published regular reports setting forth volume of trading, the open interest, the distribution of the open interest in the hands of large and small traders, and

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* McMinn testified that this February 27 ex-pit was unusual:

> the unusual part of it was that it created new positions for both the purchaser and the seller, which was to me, was new at the time. I ordinarily, an ex-pit transaction did not create a new position; it was merely an exchange from one party to another party which did not then create new open positions (JA 866a).

See Pl. Exs. 93 and 141 confirming that the February 27, 1963 ex-pit was among the first of an extensive series of ex-pit registered warehouse receipt transactions between Bunge and Allied.

information concerning the holders of the speculative interest (JA 264a-65a; *see, e.g.,* Pl. Exs. 9, 10[c], 10[g]). This public information reflecting the unusual market conditions was readily available to all members of the Board (JA 264a-68a, 402a-05a, 527a).

Further, it was common knowledge that Allied's activities were responsible for the unhealthy market conditions reflected in these warning signs (*see, e.g.,* JA 997a-98a, 1178a-82a, 1194a). The buying of contracts by Allied was continuous (JA 415a) and it was common talk that the increase in the open interest had resulted therefrom (JA 855a, 997a-98a). It was clear that Allied was stopping many deliveries (JA 681a, 1695a) and was heavily engaged in ex-pit trading (JA 515a, 681a, 1180a-81a). Everyone in the trade knew that Allied was at the root of the problem (*see, e.g.,* JA 513a-16a, 1218a, 1395a).* Indeed, defendants discussed these matters informally at Board meetings (JA 999a-1000a).

Moreover, defendants knew that the threat to orderly marketing conditions was significantly increased since DeAngelis was of highly questionable integrity and dubious financial standing.** Defendants were aware that DeAngelis had previously gone bankrupt in another commodity operation (JA 623a, 749a, 918a, 1200a) and, as a result, both MacDonald's and Anderson's companies refused to have any direct business dealings with Allied (JA 497a-500a, 1200a-01a). Defendants knew that DeAngelis had been

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* The testimony of Perry Moore and Robert L. Raclin would have reinforced the above-mentioned facts (see pp. 60-64 *infra*). Their testimony was improperly excluded (JA 430a, 1949a).

** For example, George Worthington, a vegetable oil trader for Continental, acknowledged that during 1963 there was gossip in the trade that Allied's activities were largely unprofitable and that DeAngelis was in need of financing (JA 1608a).

suspended by the Board of Trade in early 1963 (JA 624a, 751a, 919a); and knew that DeAngelis had been involved in numerous disputes with the Government, including at least one indictment and one suspension by the Department of Agriculture (JA 816a, 919a). To allow the stability of the market to depend upon Allied was clearly risky business.

2. *Information Obtained From Dealings With Allied*

What may not have been readily apparent from simple market observation and public data, was known to certain of the trader-regulators by virtue of their business relationship with Allied. This knowledge was gained in the course of unique business dealings with Allied in which the trader-regulators extended financing to Allied which in turn supplied them with cash oil at extremely low prices.

Between 1960 and 1963 Allied received the following amount of general financing from Bunge and Continental* respectively:

	Bunge (JA 1328a)	Continental (JA 1447a-48a)
1960	$ 14,046,000	$ 6,984,000
1961	78,495,000	5,785,000
1962	221,702,000	5,166,000
1963	110,467,000	34,803,000

As security for these loans, both Bunge and Continental received collateral, which in most instances exceeded 100% of the amounts loaned (JA 1312a-16a, 1439a-41a, 1595a-96a).

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* Prior to March, 1963 Allied dealt with North American Continental ("NAC"), a company owned and operated by Michel Fribourg, the President and owner of defendant Continental (JA 1468a-70a). In March 1963, NAC was merged into Continental. For the purposes of this brief, NAC and Continental will be referred to collectively as "Continental".

Not only did Bunge and Continental receive interest on their loans to Allied in the 6%-7% range (JA 1038a, 1073a, 1322a, 1471a, 1588a), but in return for extending such financing, they received a guaranteed profit of $2 per ton on their purchases of fats and oils from Allied (JA 1072a-73a, 1137a, 1323a, 1588a; Pl. Exs. 255 id., 260 id.).* This unusual guaranteed profit arrangement—which was never offered by anyone else, and which financially drained Allied—was incorporated as a term of the loans extended by Continental and Bunge (JA 1049a, 1072a-73a)** and was effectuated by Allied's sales of vegetable oil to Continental and Bunge at prices below cost (JA 1124a-25a, 1369a-70a, 1454a-56a).

By 1963 Allied was the primary supplier of oils to Continental and Bunge (JA 1368a, 1594a). Bunge did about $50-100 million per year in business with Allied (JA 1365a-66a). Allied supplied 50% of Bunge's oil requirements at extremely favorable prices (JA 1368a-69a),*** and 70% of Continental's oil needs (JA 1594a). Bunge's officials knew that without Allied's low-priced oil, Bunge could not com-

* Allied also guaranteed minimum quantities of business it would do with Bunge at this guaranteed profit—*e.g.*, Pl. Exs. 95, 98; JA 1032a-33a (500,000 tons). The Trial Court wrongfully excluded Pl. Exs. 255 id. and 260 id. (JA 1716a, 1722a-23a).

** Bunge Vice President Richard Forti admitted that at no time during his 15 years with Bunge prior to 1963 did any other supplier enter into such an arrangement whereby Bunge received a guaranteed profit (JA 1361a). Klein also testified that he knew of no other similar guaranteed profit arrangement (JA 1415a). Similarly, John D. Ferretti, Continental's Assistant Treasurer in 1963, stated that he knew of no other guaranteed profit loan arrangement of any consequence with any of the suppliers of Continental's oil department (JA 1459a). Mr. Ferretti also testified that the Continental's "pre-financing" arrangement with Allied, whereby Continental would advance money to Allied against field warehouse receipts in connection with Continental's purchases of cash oil from Allied, was unique to Allied (JA 1441a-42a).

*** Bunge's volume of business with Allied grew so huge that a special group in its oil department was established to handle "Allied Relations" (JA 1284a-85a; Pl. Ex. 103 id.).

pete with processors and refiners in the export field (JA 1455a). As a result of their ability to get oil cheaply from Allied, Bunge and Continental were able to dominate the government's P.L. 480 program.*

Bunge and Continental financed Allied's expansion to ensure that Allied would continue to supply them rather than their competitors. Defendant Klein feared that if Bunge did not continue to advance monies to Allied, Allied would take its business elsewhere (JA 1411a-12a).** So lucrative was this relationship that Continental refused to discontinue dealing with Allied notwithstanding the admonitions of a U.S. government official (JA 1619a; R. 323, pp. 44-45).*** Throughout this period, defendant Vogel was the Executive Vice President of Continental (JA 1479a).

When in early 1963 Allied sought a form of financing which would have a direct impact on the futures market—the ex-pit registered warehouse receipt financing scheme—it turned to Bunge and Continental. Both companies participated extensively in these transactions in which Allied once again agreed to give them a $2 per ton "profit" in addition to a 5½-7% per annum amount denominated as interest and payment of all their costs and expenses (Pl. Exs. 255 id., 255a-d, 260 id., 260a-f. See also discussion pp. 52-54 *infra* of Pl. Exs. 253 id., 253a-c id., 261 id., 261a-l id.). Thus, in what they themselves believed to be no-risk financing transactions (JA 1597a, 1603a; Pl. Ex. 93), Bunge and

* Evidence concerning this point was excluded at trial (JA 1329a-30a, 1332a-34a, 1619a; Pl. Exs. 84 id., 87 id., 88 id., 89 id.).

** Bunge Vice-President Fornari told Klein that it would probably be easier for Allied to find other backers than for Bunge to find other sources of supply (JA 1318a).

*** The District Court excluded all testimony on this subject on the ground that it introduced the names of new "dramatists personae" after five weeks of trial (JA 1619a).

Continental earned an effective interest rate of approximately 15% (JA 1765a) at a time when the prime rate was 4½%.* By assisting Allied in these registered warehouse receipt ex-pit financing transactions, Bunge and Continental enabled Allied to manipulate the price of vegetable oil futures in 1963.

In sum, from their various dealings with Allied, Continental and Bunge knew that Allied was in serious financial difficulty and that Allied was becoming increasingly dependent upon them (*see generally* JA 1446a-49a); and that Allied was engaging in ex-pit transactions with them to finance its purchase of registered warehouse receipts (JA 1065a-67a).

Bunge officials, including Klein, knew even more. They knew that the purpose of Allied's ex-pit registered warehouse receipt financing was to maintain futures prices at an artificially high level because Gerald Gittleman, Allied's chief commodities trader, told them so (JA 1135a-36a, 1138a-39a).

But Klein knew still more. As early as 1962, Klein learned of Allied's desperate financial situation, learned

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* Professor Roger Gray, an economist at Stanford University and a consultant to the CFTC (JA 1633a, 1634a), testified that, based upon his review of files concerning ex-pit trading between Allied, Continental and Bunge (JA 1714a-16a; Pl. Exs. 255a-d, 260a-f), the registered warehouse receipts which made round trips back to their original holder were part of a series of financing transactions. In calculating the respective rates of return to Bunge and Continental on their investment in such transactions, Professor Gray treated these returns as interest, not profit, for "profits arise from undertaking risk, and to the extent that these were risk-free transactions, and to the extent this was an assured return, then it seemed to me that it was more appropriate to characterized this as interest" (JA 1741a-42a). Analyzing the leveraged nature of these transactions, Professor Gray explained that on one sample transaction involving 600 receipts, Bunge and Continental earned on an annualized basis 94% (JA 1739a) and 150% (JA 1736a), respectively.

Professor Gray concluded that the expense to Allied for engaging in these transactions was "unusually high" (JA 1744a-46a).

that DeAngelis had issued false warehouse receipts to raise funds, and learned of DeAngelis' efforts, including bribery and the use of a weapon, to keep this a secret. Bunge and Klein concealed this knowledge and participated with DeAngelis in a scheme to perpetuate his fraudulent activities.

At that time, over a year before Allied's collapse, Bunge had loaned Allied $2,400,000 and received as collateral two Harbor Tank warehouse receipts purportedy covering 32 million pounds of cottonseed oil (see JA 2266a-67a). Immediately thereafter, Bunge sent an independent inspection company to survey the tanks allegedly holding such oil. However, firearms were used to prevent the inspection and DeAngelis paid the chief inspector $25,000 to remain quiet (JA 948a-49a). When the incident was reported to Bunge, its representatives, including defendant Klein, met with DeAngelis who admitted that Allied was short approximately $7 million worth of oil.* DeAngelis informed Bunge that Allied did have oil in the American Express field warehouse on its premises, and suggested a plan whereby Bunge could exchange the worthless Harbor Tank receipts for American Express receipts (which of course where then held by other Allied customers) (see JA 949a-51a). This switch was accomplished over the next 10 days (JA 951a; Pl. Ex. 113 id.).**

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* On September 26, 1962 Klein and Bunge had in their possession various statements providing the details of Allied's business and its futures positions (Pl. Ex. 92a-d). By subtracting the $7 million in missing oil, they could have seen that Allied was insolvent.

** The District Court excluded plaintiff's evidence on the Harbor Tank incident (JA 1010a-13a). This ruling was erroneous and seriously prejudiced the Trustee's case. See Point II herein (pp. 54-57 *infra*).

Thereafter, Bunge never mentioned the incident and continued to lend money to Allied, but only when collateralized by American Express receipts in designated tanks.* Bunge also obtained its own insurance on the pledged oil, including coverage for fraud (JA 1473a; Pl. Ex. 74). Allied, for its part, continued to supply oil to Bunge under the guaranteed profit arrangement.

Merrill Lynch brokered Continental and Bunge's ex-pit trades with Allied and earned substantial commissions thereon (JA 1148a; Pl. Exs. 140, 141, 142). Merrill Lynch thus participated in many of Allied's improper ex-pit registered warehouse receipt financing transactions. As a result of its role, Merrill Lynch knew that there were large and unusual transactions taking place (JA 1687a-88a) and that the warehouse receipts were moving back and forth amongst the same entities (JA 1688a-89a). Merrill Lynch also knew from its floor brokers that Allied was a heavy buyer of futures contracts and was putting the market price up (JA 1274a-77a). Allied's activities were discussed by Merrill Lynch with Bunge and Continental (JA 1279a-81a; *see* JA 1212a-13a).

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* Subsequent to the Harbor Tank incident, whenever Allied pledged oil to Bunge as collateral for a loan, it was required to be stored in specifically designated numbered tanks on a non-fungible basis. Testimony purporting to explain how Bunge came to require non-fungible oil from Allied was excluded (JA 1337a). Bunge revised its insurance coverage during the Spring of 1963 to obtain its own coverage on Allied oil in Bayonne which was pledged to Bunge (Pl. Ex. 230). Testimony on this subject was also excluded (*see, e.g.,* JA 1341a, 1345a). On September 30, 1963, Hamilton G. Kenner, Bunge's Secretary and Counsel, suggested a surprise inspection of Bunge oil stored at Bayonne (Pl. Ex. 76). On October 9, 1963 Klein received a memo from Vice-President Fornari enclosing an Allied financial statement "for whatever it's worth" (Pl. Ex. 252). And a November 12, 1963 memorandum reflects a Bunge proposal to install its representative on Allied premises and, in essence, to run Allied's business (Pl. Ex. 73). These various steps, designed to tighten its control over Allied, reflected Bunge's awareness of Allied's dishonesty and its increasingly disasterous financial condition.

Defendant Anderson was head of the commodity department at Merrill Lynch during 1963 and Bunge and Continental were good and valued customers of his (JA 1625a). Amongst other things, Anderson knew that Merrill Lynch would not deal with Allied and that Allied was building up a position during 1963 which he later characterized as astonishing (JA 1227a). By virtue of his activities at Merrill Lynch, defendant Anderson knew that Allied was receiving ex-pit financing from Bunge, understood its nature (JA 1169a, 1187a-89a) and was aware of the improper ex-pit transactions between Bunge and Allied. By the summer of 1963, Anderson expressed concern about the market and Allied's financial condition (JA 1181a-83a). Thus, Anderson and Merrill Lynch knew, as did Bunge and Continental and their representatives on the Board, the facts underlying the Allied price manipulation.

D. *The Regulatory Responsibilities and Failures of the Trader-Regulators*

During 1963, the Produce Exchange was a contract market designated by the Secretary of Agriculture, pursuant to the Act (JA 176a, 177a ¶ 8[a]). The fundamental purpose of the Act was to "insure fair practice and honest dealings" on commodity exchanges. H. R. Rep. No. 421, 74th Cong., 1st Sess. 1 (1935). The Act provided that contract markets were affected with a national public interest; it recognized that transactions in and prices of commodities traded on such markets "are susceptible to speculation, manipulation and control." 7 U.S.C. § 5. The designation of an exchange as a contract market is conditioned, *inter alia,* upon the requirement that its governing board provide for the prevention of price manipulations and corners. 7 U.S.C. § 7(d). Overall, the obligation of a contract market

is to maintain orderly marketing conditions and to regulate in a fundamentally fair manner (JA 488a-92a, 690a-96a, 700a-03a, 1641a, 1949a). *See Silver* v. *New York Stock Exchange,* 373 U.S. 341, 364 (1963). Indeed, it is the primary responsibility of a commodity exchange to insure a competitive market free of attempts at price manipulation. General Accounting Office, Report to the Congress: Improvfment Needed in Regulation of Commodity Futures Trading 4 (1975) ("GAO Report").

The Produce Exchange's By-Laws and Rules reflected the statutory mandate of the Act (see Pl. Ex. 55, §§ 67, 68; Pl. Ex. 56, Rules 3, 4), and imposed upon Board members the duty to prevent price manipulations and corners (Pl. Ex. 55, § 68; Pl. Ex. 56, Rule 5) The Rules also provided for wide powers to regulate futures trading thereon. Defendants' powers included the right to make investigations concerning trading activities and, in connection therewith, to subpoena witnesses and records (Pl. Ex. 55, §§ 61, 67[a]; Pl. Ex. 56, Rule 9). To ensure the financial integrity of the contracts, sc vital to the maintenance of an orderly market, defendants had authority to impose and adjust margin requirements (Pl. Ex. 55, § 67[a]; Pl. Ex. 56, Rule 9). Most importantly, and of particular significance to this case, defendants had the power to limit the number of contracts which could be held by or on behalf of any trader (Pl. Ex. 55, § 67[a]; Pl. Ex. 56, Rule 9).

In contrast to these vast powers enabling a contract market to regulate trading, and to respond promptly to particular situations as they arise, the Secretary of Agriculture's powers were of an after-the-fact, oversight nature; he could disapprove exchange rules and regulations and, after hearings, suspend or revoke the designation of a contract market which failed to comply with the Act (7 U.S.C. §§ 7b, 8[a]). Until the creation in 1974 of the

CFTC, which Congress felt was necessary to provide a strong and independent governmental regulatory role over commodity futures trading, these oversight powers were exercised by CEA, a small agency in the Department of Agriculture. In part, the CFTC was the result of strong criticism of the government regulatory agencies in their relationships with the contract markets in the DeAngelis affair and thereafter. *See, e.g.*, Department of Agriculture, Office of the Inspector General, Audit Report—Commodity Exchange Authority (1965) (Def. Ex. 211 id., "OIG Report"); GAO Report.

Despite their broad powers, the trader-regulators took a narrow view of their regulatory responsibility. To testify as to the nature of these responsibilities, defendants offered as their expert Professor Henry Arthur who reflected the view that market problems invariably correct themselves (JA 1830a) and in the end a manipulator usually gets what he deserves (JA 1830a-31a). This view was shared by MacDonald, President of the Produce Exchange, who felt that regulatory action was not called for as long as one side could take it (JA 621a-22a). Had the Trustee not been improperly limited from exploring at trial defendants' regulatory motivation, he would have shown that MacDonald's view was that the Produce Exchange was not the New York Stock Exchange. Indeed, he was right. Nor was it the Chicago Board of Trade. It had no professional investigative staff, and critical decisions were made by those having an interest in the outcome of the decision. But the Produce Exchange was not even true to its own professed notions of laissez-faire regulation. For having first decided to keep the market open on November 14th to permit profiteering from the price decline, these notions would have dictated that the market be kept open past November 20th to permit the forces of supply and demand to operate unrestrictedly—come what may. Instead, when free market operations threatened to impinge upon the pecuniary interests of the

trader-regulators—*i.e.,* when Haupt could no longer fund the price decline—they closed the market and fixed the prices at which contracts would be settled.

Whatever philosophy one subscribes to, there can be no dispute that there is an inherent danger in allowing those persons who stand to profit the most to make the critical market decisions, as witness what happened in this case.

1. *The Events Prior to November 14, 1963*

During the course of trial, it was clearly established that prior to November 14, 1963, Allied was engaged in a manipulation of prices on the Produce Exchange and that its accumulation of an unprecedented and unjustified futures position, which the trader-regulators were required to prevent, threatened orderly marketing conditions (*see, e.g.,* JA 1642a, 1669a-76a; pp. 12-15 *supra;* see Appendix II). They did not do so.

Notwithstanding their personal as well as market knowledge of Allied's condition, reputation and performance (pp. 16-28 *supra*), let alone the disruption of normal market patterns and the serious threat to orderly marketing conditions presented by Allied's activities, defendants did virtually nothing.* Unlike its sister exchange, the Board of Trade,

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* By way of contrast, in early 1963 the Board of Trade, through its Business Conduct Committee, conducted an investigation of Allied's position in March soybean oil futures (JA 1127a-29a). In connection with that investigation, Allied—a non-member of the Board of Trade—was required to supply documented proof that its position was hedged and to submit weekly reports of its cash and futures position (JA 1130a-31a, Pl. Exs. 45a-bb id.). Allied's cooperation with this investigation is evidenced by Mr. Gittleman's letter to the Committee (Pl. Ex. 45e) which revealed both Allied's cash and futures position and provided copies of Allied's cash sales contracts. On February 18, 1963, at a time when Allied held no more than 42% of the March soybean oil futures position (Pl. Ex. 219d-1 id.), the Business Conduct Committee of the Board of Trade directed Allied, through its broker, Ralph Peters & Co., to cease from maintaining such an "overwhelming" position (Pl. Exs. 45o id., 45q id.). The District Judge excluded this evidence as irrelevant (JA 193.1 [September 16, 1975]).

which early in the year restricted the size of DeAngelis' position (JA 1127a-29a; Pl. Exs. 45a-5bb id.), the Produce Exchange failed to take any meaningful steps to halt Allied's improper activities. The Business Conduct Committee, chaired by defendant Anderson, never even met during 1963 (JA 494a-95a). The Executive Committee, although possessing the pertinent powers of the Board when the full Board was not in session (Pl. Ex. 55, § 17[c]), did not meet at any time during 1963 prior to November 19th when they voted to close the market (JA 1373a).

The few steps which defendants did take were so obviously predestined to fail that one can only conclude that it was precisely with this intent that they were undertaken. Expert testimony established that based upon observable market conditions the trader-regulators were required to take effective action in early 1963 and certainly no later than the beginning of August (JA 335a-36a, 1699a-1700a, 1985a-86a). In characteristic fashion, defendants' testimony is unclear as to what, if anything, may have been done up to that point.*

By August, even the Clearing Association became impatient and concerned about the Produce Exchange's failure to act. On August 16th, Solomon J. Weinstein, President of the Clearing Association, wrote to MacDonald, President of the Produce Exchange, to inform him of his great concern over market conditions. In addition to stating that the Clearing Association viewed the situation to be "potentially dangerous," Mr. Weinstein wrote:

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* For example, MacDonald claimed that Berg sought to ascertain Allied's futures position in July, but dropped the matter when it was not provided (JA 520a-23a); Berg however could not recall whether he had in fact sought the information at that time (JA 723a-25a).

> The Board of Directors of this Association feels some apprehension over the increasing concentration of contracts in the hands of a relatively few Clearing Members. Large offsetting positions are established by apparently affiliated interests through the medium of 'Ex Pit' transactions and are often liquidated by the same method. *We believe this situation to be unhealthy, and are concerned that the position of the Exchange and of the Clearing Association may be jeopardized.*
>
> *We respectfully suggest therefore that the Board of Managers investigate this situation in order that the interests of the Exchange* and of the Clearing Association *may be safeguarded.* It is our opinion that if this concentration of interest persists, the Association may be forced to consider an increase in its own original margin requirement (Pl. Ex. 27) (emphasis supplied).

Incredibly, more than a month had passed before MacDonald even responded. On September 23rd, MacDonald, Fashena and Berg met with Weinstein and his assistant to discuss the matter. The only thing that came of the meeting, and even then only after it was agreed that it would not hurt the booming volume of business on the Produce Exchange, was the imposition by the Clearing Association of additional margin on clearing members effective six weeks later (JA 547a-48a; Pl. Ex. 15a).

Unlike the trader-regulators, prior to September 1963, Haupt had only limited experience in the vegetable oil futures markets. Being new to the business, Haupt sought the advice of the Produce Exchange prior to engaging in ex-pit trading as a broker for Allied. The Produce Exchange gave Haupt the green light to proceed (JA 1875a-76a).*

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* In September 1963 Haupt was asked to take over 672 Allied contracts in a Rule 6-A ex-pit trade. Fred Barton of Haupt called Berg to apprise him of this large transaction (JA 1875a-76a), and the procedure Haupt intended to follow. Berg informed Barton

Subsequent to Haupt taking on a sizeable position for Allied in September, 1963, Berg met with Jack Stevens ("Stevens") an employee of Haupt to see if Haupt knew what it was doing (JA 744a-45a). MacDonald assumed Berg had spoken to the managing partner of Haupt because that is what should have been done (JA 530a-33a). This was not done. Further, Berg did not request, nor did he obtain a single sheet of paper from Haupt regarding its relationship with Allied (JA 774a). Berg claimed he wanted to check Stevens' representations, so he then met with DeAngelis (JA 775a-76a). At that meeting, Berg did not obtain any details of Allied's cash or futures position, or of its trading or business requirements (JA 752a, 764a-71a). Notwithstanding Berg's testimony that from the market's standpoint it was essential to determine whether Allied's position was legitimate (JA 728a-30a), he failed to do so (*see* JA 718a-19a, 721a, 731a, 738a-39a, 764a-71a). Further, although DeAngelis promised Berg that he would reduce the size of his position, he failed to do so; and Berg never checked to see whether DeAngelis had kept his promise (JA 782a-83a, 787a).

Berg stated that he informed Anderson of his meeting with DeAngelis (JA 777a); Anderson denied it (JA 1202a). But this was of little moment. Anderson already knew that Allied was building up its cottonseed oil position during 1963 and had heard that Allied was engaging in ex-pit trading (JA 1179a-81a). The one time Berg attempted to

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that Haupt was proceeding properly and the transaction was consummated on that basis (JA 1875a-76a). In late September Haupt was requested for the first time to participate as broker in a large type 6-B ex-pit trade. Barton notified Berg of the transaction and Berg told him what documentation should be submitted to the Produce Exchange (JA 1908a-09a). Barton followed the requirements of the Exchange rules. Ironically, Haupt was the only firm that supplied to the Produce Exchange during 1963 the proper documentation in support of a type 6-B ex-pit transaction (compare Def. Ex. 204 and Pl. Ex. 266 with Pl. Exs. 62, 126a and 193). See footnote, p. 35 *infra*.

ascertain the *bona fides* of an unusual ex-pit trade, Anderson helped his customer Bunge defuse the investigation (*see* Pl. Ex. 82).*

In short, business was booming and everybody was making money, especially Bunge and Continental. It is not surprising to find that, under the circumstances, the trader-regulators looked the other way and let Allied continue its manipulative and soon to be disastrous activities.

2. *The Events of November 14-20, 1963*

In November, 1963, the inevitable consequence of defendants' regulatory failures came home to roost and the price of cottonseed oil futures collapsed. At that point, defendants, in their role as regulators, compounded their improper conduct and shifted the burden of their prior regulatory failures to Allied and Haupt, while at the same time profiting as traders. It is during this November 14-20th period that the most dramatic evidence of defendants' misconduct is found. So ludicrous were these events that they can be explained in no other way than as a subterfuge to delay closing the market so that the trader-regulators and the other shorts could continue to profit from the falling prices.

On November 13th, DeAngelis informed Klein and several of his colleagues at Bunge that Allied held roughly 8,000 cottonseed oil and soybean oil futures contracts (JA 1385a-86a). That same day, Anderson was informed by a member of his staff at Merrill Lynch that DeAngelis held 50% of the long position in both the cottonseed oil and

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* Throughout 1963, the trader-regulators continually failed to report the details (*e.g.*, documentation of the underlying purchase or sale of cash oil) of their ex-pit transactions with Allied, as required by Produce Exchange Rule 6-B. The Produce Exchange never requested this information, with the possible exception of the instance referred to above—and even then it was not provided. As the OIG Report indicates, had the defendants enforced the reporting requirements of Rule 6-B, even the non-participants would have been aware of the improper nature of the huge volume of ex-pit trading taking place (Def. Ex. 211 id., p. 49).

soybean oil futures markets. Anderson, extremely concerned, called upon his client, Klein, to tell him the details (JA 1203a).* After some discussion, they called Berg and asked him to request the CEA to provide the Produce Exchange with exact positions in cottonseed oil futures contracts (JA 1205a-06a). Berg did so (JA 741a-42a).

On the morning of November 14th, the CEA delivered to Berg a handwritten sheet setting forth the identity and positions of everyone holding more than 100 contracts (long or short) (JA 812a; Pl. Ex. 1). This sheet reflected that Allied held 90% of the overall long position, and greater than 90% in the near contract month (December).** Berg

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* Anderson contacted Klein both as an Exchange official and in Klein's unofficial capacity as a client of Merrill Lynch. Interestingly, on the few occasions when Anderson made inquiries on behalf of the Produce Exchange concerning the state of the cottonseed oil futures market during 1963, he spoke to someone at Bunge, his client (JA 1203a-06a, 1246a-47a; Pl. Exs. 80-83). Klein did not exhibit the same regard for Anderson—when they met on November 13, he did not even tell Anderson what he had just learned from DeAngelis (JA 1391a-92a).

** Allied's huge position in the near month presented a grave threat of a squeeze which heightened the need for urgent action on November 14th (JA 2014a-16a). Indeed, its overall position was larger than the entire factory and warehouse stocks of cash cottonseed oil in the United States (Pl. Ex. 127). Two weeks away from the first notice day for the December contract, Allied held 5,428 of the 5,533 outstanding long December contracts (Pl. Ex. 1). At that time, there were only 3,219 outstanding registered warehouse receipts (JA 589a-90a; Pl. Ex. 249). MacDonald and Berg knew that DeAngelis owned at least 2500 of the 3219 outstanding receipts, so that only 719 receipts were left which could be tendered to satisfy the shorts' obligation to DeAngelis (JA 592a).

If DeAngelis chose to stand for delivery on all 5,428 of his long contracts, the shorts would need an additional 4,709 receipts. Neither MacDonald nor anyone else at the Produce Exchange checked with the companies listed on Pl. Ex. 249 to see whether they had enough oil in their registered warehouses available for delivery (JA 591a) to combat this threat of a squeeze. Since it is both costly and time-consuming to move oil into deliverable position (JA 1096a-97a), there was good reason to fear that Allied, by standing for delivery and by taking advantage of the shorts' inability to get deliverable oil, could easily squeeze the shorts and force them to buy Allied's long contracts to offset their short contracts at an artificially high price.

conveyed this information to MacDonald, who directed him to lock the report in the safe and call a special Board meeting for that afternoon (JA 551a, 554a-55a, 820a-21a). Berg told Anderson that Allied held 90% of the outstanding long contracts (JA 814a). Klein also obtained this information.*

Later that morning, Anderson spoke with Alex Caldwell, head of the CEA, and they agreed that this was a wholly unprecedent situation which required prompt action (JA 1209a-10a). Both Anderson and Caldwell were worried about a squeeze or corner developing (JA 1209a-10a). The next day, Caldwell spoke to MacDonald and reiterated his great concern about the condition of the market (JA 585a-86a) and told MacDonald that the market may have to be closed (JA 602a-03a). Caldwell was so upset that he discussed the situation with the Assistant Secretary of Agriculture; he then called MacDonald back and informed him that he had been instructed to read to MacDonald Section 5(d) of the Act (7 U.S.C. § 7[d]), which required the Board to provide for the prevention of manipulations and corners (JA 599a-601a).

The Produce Exchange held a special Board meeting on the afternoon of November 14th. At that meeting, both MacDonald and Anderson expressed concern as to the unusual trading, the degree of concentration and the generally unhealthy condition of the market (JA 825a; Pl. Ex. 12h id.). They recommended the appointment of a Control Committee (JA 567a-68a, 1218a-19a). The full Board was not told of the report that had been received from the CEA nor

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* Anderson stated he may well have discussed Allied's futures position as reflected on the CEA sheet with Klein on November 14 (JA 1212a-13a). Richard Forti, whose deposition testimony was improperly excluded by the trial court, confirmed that Anderson conveyed this information to Klein (JA 1436a-39a). Shortly thereafter, Kenner, one of Bunge's chief officials, called and recited to DeAngelis, Allied's exact cottonseed oil futures position (JA 1090a-92a).

any of the information contained therein, because "nobody wanted to shake the apple tree" (JA 826a-27a). A Control Committee, consisting of at least MacDonald and Berg,* was appointed to look into the situation (JA 570a, 819a) and determine who held the substantial open positions—the very information specifically reflected on the CEA sheet.

On November 15th the Control Committee wrote a letter to all clearing members and requested them to supply, by November 20th, the names and positions of each of their customers holding 15 or more cottonseed oil futures contracts (Pl. Ex. 17). Clearly, if the Control Committee really wanted this information they would have used the telephone. In truth, however, this information was already generally known: Anderson, acting as "trader", as distinguished from Anderson, acting as "regulator", knew precisely whom to call.** Further, the entire "information/no information" issue was of little consequence, as the trader-regulators well knew. On November 14th, with DeAngelis holding 90% of the long side of the market, with prices at artificially high levels, and with a handful of shorts sitting on the other side waiting for prices

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* There was considerable confusion concerning the identity of the members of the Control Committee. The minutes of the November 14th Board meeting indicate that Anderson, MacDonald, Berg and Jules M. Salmanowitz were elected, but that Salmanowitz was unable to serve and was replaced by John D. Allen (Pl. Ex. 12h id.). At a subsequent Board meeting, seven months later, these minutes were corrected to reflect that Anderson was *not* a Control Committee member (Pl. Ex. 12m id.). Anderson claimed he was never on the Control Committee (JA 1219a). MacDonald and Berg owned up to their Committee membership (JA 568a, 816a).

** Ostensibly, one reason for the position call was to find out which companies held the outstanding long and short contracts so that, perhaps, a voluntary liquidation could be achieved by matching the longs with the shorts (JA 578a-80a). All of the necessary information was set forth on Pl. Ex. 1. MacDonald claimed that it was also necessary to obtain the names of the clearing members whose customers held the large open positions so that the

to fall, it was obvious that a voluntary transfer of Allied's position was impossible. There would simply be no takers (JA 1228a-33a). Under such circumstances, it took no expert to know that there would be a drastic price decline, that the shorts would profit, that an orderly market was impossible and that intervention would be required to remove the overhang of the Allied position.

Incredibly, after receiving the CEA sheet neither MacDonald nor Berg called DeAngelis (JA 814a). Nor did they call Haupt which they knew was holding a substantial number of contracts for Allied (JA 814a). Instead, the CEA sheet was buried in the safe and the pertinent information withheld from the full Board. At the time he engaged in the Control Committee ruse to avoid closing the market, MacDonald believed that cottonseed oil futures prices were "too high" (JA 604a-05a) and that the situation presented "a good opportunity for people who wanted to sell oil" (JA 598a-99a). MacDonald's justification is difficult to comprehend. If the price was artificially high on November 14 it was only because of defendants' prior regulatory failure in allowing DeAngelis to push it there. Surely, the defendants cannot rely upon their prior failures to justify their role in allowing the market price to be sold down, thus placing the

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Produce Exchange could go through them and avoid creation of a panic situation (JA 682a). However, when Haupt, in desperate straits, begged Merrill Lynch for help, Anderson simply picked up the phone and called a few companies holding large short positions to see if they wanted to take over Allied's position. Anderson did not go through the clearing members; he called the customers directly (JA 1228a-31a). Furthermore, he already knew who they were and did not in any way need the information requested by the Control Committee letter. Indeed, neither Anderson nor Klein, whose assistance Haupt also sought in its attempt to see whether the Allied position could be liquidated, even mentioned to Haupt that a Control Committee had been formed to work out such a liquidation (JA 1200a-01a, 1406a-11a). The Control Committee did not meet (JA 583a). Obviously, it never attempted to accomplish a voluntary liquidation.

entire burden of the decline upon Haupt. If, on the other hand, the price was not artificially high on November 14th, then there was no conceivable justification for allowing it thereafter to be sold down.

MacDonald did speak to DeAngelis on the night of November 18th, at which time he learned that DeAngelis could withstand no more than another 12½ point drop (⅛ cent per pound), one-half of the 25 point price limitation that a quorum of the Executive Committee (MacDonald, Vogel and Anderson) had just imposed, effective the next day (JA 615a). MacDonald did not call Vogel and Anderson back to discuss a further reduction of the price fluctuation limit in light of DeAngelis' statement (JA 1778a, 1781a-82a), nor did he call Haupt to tell them that their customer was about to go bankrupt (JA 675a).

While the Produce Exchange pursued the slowest available course of action, this was not the case with regulator Klein wearing his "trader" hat. On November 14th, having obtained inside information, trader Klein met with his chief assistants at Bunge and instructed them to start selling cottonseed oil and soybean oil futures (JA 1295a-1308a, 1353a-57a, 1358a). Regulator Klein then went to Buenos Aires "on business". Thereafter, Bunge sold vegetable oil futures contracts in substantial numbers, as follows (JA 1298a-1308a):

	Cottonseed Oil	Soybean Oil
November 14, 1963	179	440
November 15, 1963	115	315
November 18, 1963	100	295
November 19, 1963	38	594
Total	432	1,644

Bunge profited by over $2 million on these short sales (Pl. Ex. 154 id.).*

Most of Bunge's trades were handled by Merrill Lynch as broker (JA 1331a). In fact, virtually all of Merrill Lynch's customers held short positions in vegetable oil futures (Pl. Ex. 217). Despite his announced concern with the threat to orderly marketing conditions, Anderson made no attempt to monitor the cottonseed oil trading of his customers (JA 1250a-51a), although he knew at the time that such customers, including Bunge, were selling contracts (JA 1252a). Keeping the information received from Berg a secret, Anderson joined in the vote to establish a Control Committee to investigate and determine the very facts that were already known. During this charade the market remained open and prices declined precipitously, favoring the shorts. Indeed, Merrill Lynch seized the opportunity to assist its short customers by "selling the market down" during this period (JA 441a).

Vogel's company, Continental, which already had accumulated a sizeable short position, elected to stand pat during the November 14-20th period and rake in $6,000,000 in variation margin payments on its short position in vegetable oil futures as prices collapsed (Pl. Ex. 150 id.).**

On November 19th, it was announced that Allied had filed for bankruptcy (JA 1407a). Later that day, a joint meeting was held between members of the Executive Committee of the Produce Exchange and members of the Board of Directors of the Clearing Association, along with repre-

* The District Court excluded this evidence as irrelevant (JA 1814a). The Trustee was allowed to show that Bunge's profits in cottonseed oil during this period exceeded $400,000 (JA 1793a).

** The District Court excluded this evidence as irrelevant (JA 1814a).

sentatives from Haupt, Williston & Beane (another broker for Allied), and other members of the Exchange (Pl. Ex. 16f). At this meeting, the Haupt representatives stated that, in view of the Allied bankruptcy, if the market continued to decline, Haupt would run out of money and thereby default on its obligations to the Clearing Association (JA 1237a).

Since on November 19th the market was expected to decline even further, the trader-regulators and others at the meeting knew that they and other clearing members would then have to pay out their own money pursuant to the Clearing Association's rules.* Faced as traders with the threat of now having to finance further market declines themselves, the regulator hat was suddenly placed on and finally the market was closed.

Not satisfied with the monies already gained by the short interests, defendants established a settlement price, for all outstanding contracts, substantially below the day's closing price, thereby providing the shorts with further windfall profits.** Two facts are clear in connection with the

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* If Haupt failed to meet its obligations, the Clearing Association would, under the default rule, first sell off all of the contracts held by Haupt which, under the circumstances, would have driven the price even lower, causing an even greater deficit. If a deficit remained, the Clearing Association would avail itself of various funds including its surplus account. If these sources were inadequate to cover the default (a likely possibility in view of the size of Haupt's position) then the other clearing members would have to meet the obligation in amounts proportionate to their trading volume (JA 460a-61a; Pl. Ex. 59 id. § 27).

** Defendant Fashena admitted that he agreed to the settlement price on November 19th even though he knew it was lower than the closing market price and that it had been established on the basis of the closing prices of soybean oil futures, which prices themselves were artificially reduced because of the distress sale of Allied's contracts (JA 940a-42a).

fixing of the settlement price: (1) defendants were cognizant of threats by short interests to file suit if prices were not pegged at a sufficiently low level (JA 661a, 850a-52a, 985a-86a), and (2) the level at which prices were pegged benefited the trader-regulators, their companies, and their customers, as holders of the short positions (JA 1498a-99a).

No additional information had been obtained by the so-called regulators from November 14th through November 19th; the only significant difference in the market situation between those dates was that on November 19th the defendants, wearing their regulator hats, knew that Haupt was broke and therefore could no longer fund the market decline which provided defendants, wearing their trader hats, and their customers with further windfall profits.

* * *

It was, in brief, the above set of facts, established at trial out of the mouths of hostile witnesses which constitutes the Trustee's case as it should have been submitted to the jury under appropriate instructions. While one could not realistically expect the trader-regulators to admit their own bad faith, the circumstances leave room for no other conclusion. Under established law, because defendants regulated in their own self-interest as traders* at the expense

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* This problem was heightened because of defendants' admitted awareness that they represented their companies when serving on the Produce Exchange Board. For example, defendant Klein stated:

> I believe I was nominated when a prior Board of Managers [sic] who had represented our company, Mr. Hirschler was transferred from New York. He had represented Bunge, and when he left New York in 1959 I came on as a representative of Bunge really in the grain business (JA 1375a).

of Haupt and others and did not fulfill their responsibilities as regulators, they violated the antitrust laws, *see, e.g., Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963); *Cargill, Inc.* v. *Board of Trade,* 164 F.2d 820 (7th Cir. 1947), *cert. denied,* 333 U.S. 880 (1948), and the Commodity Exchange Act, *see Daniel* v. *Board of Trade,* 164 F.2d 815 (7th Cir. 1947).

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DIRECTING A VERDICT ON THE BAD FAITH CLAIMS.

The Trustee submits that the foregoing facts present a clear picture of bad faith regulation. The trader-regulators, in pursuit of their own selfish interests, ignored their responsibilities and permitted DeAngelis to manipulate cottonseed oil prices and to accumulate an astronomical number of contracts. Then, faced with an artificially high price on November 14th which was about to fall, the trader-regulators chose to keep the market open and impose the burden of their regulatory failure upon Haupt. Only when Haupt ran out of money to fund the price decline which was benefiting the shorts did the trader-regulators close the market.

Nevertheless, the District Court directed a verdict at the close of plaintiff's case, dismissing the antitrust allegations contained in Count II of plaintiff's amended complaint and so much of Count I thereof as alleged that defendants acted in bad faith, stating:

> There is no evidence of any combination or conspiracy, no evidence I can recall in this record; and there is no evidence that constitutes bad faith I can recall on the record or that any reasonable person—I think that is the state of the—could conclude from that (JA 1794a).

In reaching this conclusion, the District Court evidently misunderstood the nature of the Trustee's claims and usurped the jury's function to evaluate the facts and the credibility of the witnesses, and thereupon to determine whether defendants were motivated by bad faith.

A. *The Trial Judge Applied the Wrong Legal Standard to the Antitrust Claim and the Bad Faith Aspect of the Commodity Exchange Act Claim*

All contracts and combinations in restraint of trade are made illegal by the express terms of Section 1 of the Sherman Act, 15 U.S.C. § 1. Case law has limited the scope of this section to those contracts and combinations which unreasonably restrain trade. *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911). In directing a verdict against the Trustee on Count II, the District Court decided that there was no contract or combination in restraint of trade and that there was, in any event, no bad faith regulation. This decision was erroneous.

The Court below apparently believed that the Trustee was required to show that there were meetings at which the trader-regulators affirmatively agreed to pursue a common course of conduct (JA 1794a). This is not the law. No separate proof of any contract or combination in restraint of trade is necessary here because, by definition, a commodity exchange is a combination which restrains

trade. *See Board of Trade* v. *United States,* 246 U.S. 231 (1918). Its rules determine how and under what conditions transactions on an exchange should take place, and who can engage therein. The mere requirement that all futures contracts traded on an exchange conform in both form and substance to prescribed rules presents a threshold restraint of trade (*see* Pl. Ex. 56, Rule 1).

As a matter of law, defendants' bad faith regulation of the Produce Exchange was manifestly unreasonable and therefore constituted a violation of both the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.,* and the antitrust laws. *Board of Trade* v. *United States,* 246 U.S. 231 (1918); *Daniel* v. *Board of Trade,* 164 F.2d 815 (7th Cir. 1947); *Cargill, Inc.* v. *Board of Trade,* 164 F.2d 820 (7th Cir. 1947), *cert. denied,* 333 U.S. 880 (1948); *see Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963).

In *Daniel* v. *Board of Trade, supra,* the court stated:

> While we have held that the Board and Clearing were authorized to act as they did, we further hold that if, instead of acting as they purported to act in accordance with the rules and by-laws to meet an emergency and deal with it in a bona fide manner for the good of the market generally, *they acted in their own selfish interest for their private gain, such action as alleged would vitiate the whole transaction. Id.* at 820 (emphasis supplied).

Contract markets do not enjoy blanket immunity from the antitrust laws. *Cargill, Inc.* v. *Board of Trade, supra; see also Silver* v. *New York Stock Exchange, supra; Thill Securities Corp.* v. *New York Stock Exchange,* 433 F.2d 264 (7th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971). Their limited immunity is narrowly construed to encompass only those restraints of trade essential to carry out the

purposes of the Commodity Exchange Act. *See Silver* v. *New York Stock Exchange, supra; Cargill, Inc.* v. *Board of Trade, supra.*

Obviously, action taken in bad faith or in an unfair manner does not further the purposes of the Act and cannot be exempt from the antitrust laws. This proposition has long been accorded full recognition in the context of commodity futures market regulation. *Cargill, Inc.* v. *Board of Trade, supra.* In *Silver,* the Supreme Court stated:

> Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner. 373 U.S. at 364.*

Here, substantial evidence was presented at trial to permit the jury to find that defendants regulated the Produce Exchange in bad faith and in a fundamentally unfair manner during 1963, thereby violating the Commodity Exchange Act and the Sherman Act. They did so prior to November 14th by refusing to kill the Allied goose which was laying an abundance of golden eggs. They did so on and after November 14th by keeping the market open in order to benefit the holders of the short position, including themselves.

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* This position is reinforced by decisions in other areas where commercial restraints exist pursuant to a limited exemption from the antitrust laws. Thus, labor unions and agricultural cooperatives which act in bad faith or in a fundamentally unfair manner are subject to the proscriptions of the antitrust laws. *See, e.g., Maryland & Virginia Milk Producers Ass'n* v. *United States,* 362 U.S. 458 (1960); *United States* v. *Fish Smokers Trade Council,* 183 F. Supp. 227 (S.D.N.Y. 1960).

B. In Usurping the Jury's Function, the District Court Transgressed the Appropriate Standard for Directing a Verdict

In order to grant a motion for directed verdict, the District Court must find that, leaving aside the credibility of witnesses, the jury could reach only one reasonable conclusion. *Brady* v. *Southern Ry.*, 320 U.S. 476, 479 (1943).* In reaching its determination, the Trial Court must view the evidence in the light most favorable to the non-movant and must give him "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 696 (1962); *accord, Bigelow* v. *Agway, Inc.*, 506 F.2d 551 (2d Cir. 1974). Even where the facts are undisputed, the case must go to the jury if conflicting inferences may be drawn therefrom. Wright & Miller, Federal Practice & Procedure § 2528, p. 564 (1971); see *Wells* v. *Warren Company*, 328 F.2d 666, 669 (5th Cir. 1964):

> If the state of the evidence is such that it presents no conflict, nevertheless, if reasonable minds may draw conflicting or contrary inferences from the same evidence requiring different verdicts, it is for the jury to determine which is the correct inference.

In the instant case, the Trustee's evidence of bad faith raises the question of defendants' motives and intentions in failing properly to regulate the Produce Exchange during 1963. Questions of motivation, intent, good faith and similar questions, if at all doubtful, are to be treated as questions to be determined by the fact-finder. *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949); *N.L.R.B.* v. *Brown & Root, Inc.*, 203 F.2d 139, 147 (8th Cir. 1953); *Kitty Clover, Inc.* v. *N.L.R.B.*, 208 F.2d 212, 215 (8th Cir. 1953). Where, as is often the case, there is no direct proof, "intent may be inferred from the relevant facts in evidence." *Majestic Securities Corp.* v. *Comm'r of Int. Rev.*, 120 F.2d 12, 14 (8th Cir. 1941); *see also N.L.R.B.* v. *Kem Distributing Co.*, 389 F.2d 386 (5th Cir. 1967) ("Like many other cases involving motivation, the finder of fact must draw inferences from the evidence before it").

* Naturally, if the credibility of a witness is relevant to the determination, the issue must go to the jury. *Hirsch* v. *Archer-Daniels-Midland Co.*, 288 F.2d 685, 686 (2d Cir. 1961); *Ahlgren* v. *Red Star Towing & Transp. Co.*, 214 F.2d 618, 620 (2d Cir. 1954).

The evidence on bad faith, as to whether defendants regulated in their own self-interest or fairly in the public interest, when viewed in the light most favorable to the Trustee, demonstrates that the defendant trader-regulator's position throughout was instinct with conflict. Had they acted in the public interest they would have defeated their private greed; but greed won out. Clearly, the jury—if permitted—could have so found.

Thus the Trustee established:

—DeAngelis' motivation to manipulate, the details of his manipulation and the threat to orderly marketing, pp, 10-15 *supra.**

—the publicly known market indicia and defendants' knowledge thereof from which the jury could easily have concluded that the trader-regulators knew of

* *E.g.*, JA 416a-17a, 438a-39a, 482a-83a, 585a-86a, 866a-67a, 1083a-85a, 1087a-88a, 1095a, 1112a-13a, 1123a, 1132a, 1144a-47a, 1254a-56a, 1636a-37a, 1641a-42a, 1652a-55a, 1657a-76a, 1695a-98a, 1779a-82a, 2002a-06a, 2007a-08a; Pl. Exs. 1, 27, 28, 133, 249; *see generally* Appendix II.

the manipulation and the threat to orderly marketing, pp. 16-22 *supra.**

—the knowledge on the part of Bunge, Continental and Merrill Lynch of DeAngelis' actual operations and lack of financial stability, from which the jury could easily have concluded that there was additional knowledge of the manipulation and threat to orderly marketing on the part of the trader-regulators representing those companies—Klein, Vogel and Anderson, pp. 22-28 *supra.***

—the general pecuniary interest of all the trader-regulators and the specific pecuniary interest of Bunge, Continental and their broker, Merrill Lynch, in not stopping DeAngelis' activities throughout 1963, from which the jury could easily have concluded that the trader-regulators, for selfish motives, failed to act, pp. 22-35 *supra.****

—the virtual farce of November 14th through 20th when the trader-regulators ignored what they knew about the impending collapse of the market and hid from themselves the information which they claimed

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* *E.g.,* JA 264a-65a, 269a-70a, 341a-42a, 363a-70a, 401a-05a, 418a-21a, 435a, 440a, 511a-12a, 514a, 527a, 732a, 809a, 899a, 901a-04a, 1177a-82a, 1191a, 1692a-93a, 1699a-1701a; Pl. Exs. 9, 10(c), 10(g), 41, 122-27; *see also* 437a, 501a-02a, 515a, 681a; (Tr. 1952), 997a-98a, 1000a-02a, 1608a-09a; Pl. Exs. 27, 28.

** *E.g.,* JA 750a-51a, 1028a-34a, 1035a-40a, 1044a-49a, 1072a-73a, 1086a, 1089a-94a, 1124a-25a, 1133a-60a, 1162a, 1187a-90a, 1200a-01a, 1274a-77a, 1279a-81a, 1284a-85a, 1289a, 1290a-91a, 1312a-16a, 1318a, 1322a-23a, 1328a, 1344a-45a, 1346a-48a, 1359a-61a, 1362a-64a, 1365a, 1367a, 1368a-70a, 1381a, 1382a-84a, 1387a-88a, 1411a-13a, 1414a, 1415a, 1416a, 1428a-31a, 1433a, 1434a-35a, 1439a-45a, 1446a, 1451a, 1452a, 1454a-56a, 1458a-60a, 1461a-63a, 1464a, 1466a, 1471a, 1558a-60a, 1583a-86a, 1678a-89a 1731a-46a; Pl. Exs. 73, 76, 92a-d, 95, 98, 140, 141, 142, 166, 230, 252, 255a-d, 260a-f.

*** *E.g.,* JA 511a, 514a, 517a-18a, 598a-99a, 1086a, 1187a-88a, 1237a, 1250a-52a, 1317a-18a, 1331a, 1360a-61a, 1368a-70a, 1415a, 1428a-32a, 1447a-49a, 1458a-60a, 1594a-96a, 1597a, 1731a-42a; Pl. Exs. 16f, 73, 95. 98, 140, 141, 142, 166, 217, 255a-d, 258a, 260a-f.

> they needed to regulate while, at the same time, either participating in or permitting profiteering at the expense of Haupt and the well-being of the market, pp. 35-43 *supra.**

The ultimate fact nailing down the bad faith of the trader-regulators is their act of closing the market on November 19th, demonstrating that there *was* action which the trader-regulators could have taken in the public interest. But why did they wait—for there was absolutely nothing the trader-regulators knew on November 19th which they did not know on November 14th, with one major exception: on November 19th the trader-regulators knew that DeAngelis and Haupt were broke (JA 674a-75a, 817a, 936a, 1238a; Pl. Ex. 16f). This knowledge prompted them finally to act, not because of the public interest, but again out of sheer venality. Any further drop in the market would be underwritten not by Allied or Haupt—but by the trader-regulators themselves. At this point their enthusiasm for laissez-faire evaporated —and the game was closed down.

Thus, the jury could easily have found bad faith and unfair dealing. The District Court committed reversible error in taking the bad faith issue away from the jury.

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* *E.g.*, JA 474a-75a, 481a-82a, 549a-52a, 554a-55a, 578a-80a, 583a-86a, 592a-93a, 598a-99a, 603a-07a, 615a, 617a, 618a-19a, 670a-75a, 682a-84a, 810a-12a, 813a-15a, 819a-21a, 825a, 826a-27a, 1089a-94a, 1197a-1201a, 1203a-06a, 1208a-11a, 1212a-13a, 1218a, 1237a, 1242a-43a, 1250a-52a, 1294a-1307a, 1331a, 1351a-57a, 1385a-86a, 1571a, 1572a-74a, 1579a-80a, 2011a-16a; Pl. Exs. 1, 17, 18a-bb, 133, 217, 249, 258.

POINT II

THE DISTRICT COURT ERRED IN EXCLUDING SUBSTANTIAL ADDITIONAL EVIDENCE OFFERED TO PROVE DEFENDANTS' IMPROPER REGULATION

A. *Bad Faith*

We have demonstrated in Point I above that the District Court erred in removing from the jury's deliberations the issue of bad faith in the face of the substantial evidence in the record establishing such bad faith on the part of the trader-regulators. But furthermore, the Court's errors on bad faith began before this terminal act; time and again the District Court precluded the Trustee from presenting substantial evidence which conclusively establishes the bad faith of the trader-regulators.

Thus, the Trustee was precluded from showing that defendants profited from an illicit program of activities involving both the cottonseed oil and the soybean oil markets (*see, e.g.,* JA 398a, 1324a, 1571a, 1645a-46a, 1791a-92a, 2049a);* that defendants Bunge and Klein participated in the "Harbor Tank" incident (JA 1010a-13a) and engaged in subsequent conduct which demonstrated knowledge of DeAngelis' fraudulent activities and unstable financial condi-

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* Although the underlying documentation of the Allied/Bunge and Allied/Continental ex-pit registered warehouse receipt financial transactions in cottonseed oil were received in evidence (Pl. Exs. 255a-d, 260a-f), the Court improperly excluded charts summarizing these transactions and calculating the monies gained by Bunge and Continental in connection therewith (Pl. Exs. 255 id., 260 id.; JA 1722a-23a). The entire proof offered by the Trustee concerning the Allied/Bunge and Allied/Continental soybean oil ex-pit registered warehouse receipt transactions was excluded (JA 1814a). In addition, the District Court excluded evidence of the activities and gains of Bunge, Continental and their broker Merrill Lynch in cottonseed oil futures between November 14th and 19th (Pl. Exs. 148 id., 150 id., 152 id.; JA 1813a).

tion (*see, e.g.,* JA 1324a, 1329a, 1341a, 1345a); and that Continental's business relationship with Allied gave it special knowledge of Allied's precarious finances (*see, e.g.,* JA 1452a, 1457a, 1587a).

1. *Soybean Oil*

The trial judge ruled that evidence could only be introduced relating to cottonseed oil transactions, even though the trial record establishes that soybean oil and cottonseed oil are interchangeable products, that Allied and the defendants recognized this fact during 1963 and dealt in both vegetable oils interchangeably, and that these oils experienced parallel price movements in both the cash and futures markets (*see, e.g.,* JA 221a-22a, 671a, 984a-85a, 1304a).*

The Trustee was prepared to introduce at trial evidence of Bunge's and Continental's dealings with DeAngelis in soybean oil—cash and futures (Pl. Exs. 253 id., 253a-c id., 261 id., 261a-l id.; JA 1807a, 1814a, 1329a, 1571a, 1587a); the nature and extent of the profits made by Bunge and Continental in those dealings which furnished an additional pecuniary motive for the failure to call a halt to Allied's activities on the Produce Exchange, and later the failure to close the cottonseed oil futures market (Pl. Exs. 147 id., 149 id., 151 id., 153 id., 154 id., 253 id., 261 id.; JA 1807a, 1813a-14a, 1575a, 1724a-26a, 1730a); the knowledge of and participation by Bunge, Continental and other trader-regulators in Allied's activities in soybean oil and the relationship of those activities to its manipulation of cottonseed

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* Indeed, the price of soybean oil futures was the basis for the settlement price established by defendants for cottonseed oil futures contracts when they closed the market effective November 20, 1963 (JA 670a-73a).

oil futures prices (JA 1324a, 1587a, 1644a-46a);* and the manner in which Bunge earned substantial profits in the soybean oil market based upon misuse of inside information gained in its role as regulator of the cottonseed oil market (JA 1726a, 1727a-29a). Also excluded was testimony by De-Angelis which would have related the soybean oil ex-pit financing transactions with the manipulation of cottonseed oil futures prices on the Produce Exchange (JA 1059a-60a).

The Trustee's proffered evidence was clearly relevant to the issues of the case. The exclusion of the Trustee's proof of defendants' soybean oil transactions with Allied and their respective profits therefrom constituted prejudicial error. *See Federal Trade Comm'n* v. *Cement Institute,* 333 U.S. 683, 705 (1948); *accord, Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 709-10 (1962).

2. *Harbor Tank Incident*

Based upon pre-trial testimony, the Trustee knew that defendant Klein would claim that he regulated the Produce Exchange in good faith during 1963, unblemished by his actual knowledge of Allied's precarious financial condition

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* Indeed, one of the most abusive techniques of all—the ex-pit roll-over transaction having a churning effect on the market—surfaced repeatedly in connection with the Continental/Allied soybean oil ex-pits (compare testimony describing ex-pit roll-overs [JA 1521a-25a, 1536a-50a, 1558a-64a, 1565a-70a] with Pl. Exs. 253 id., 253a-e id.). The preponderance of warehouse receipts received by Continental from Allied was for soybean oil (JA 1472a). When Continental's soybean oil activities are taken into account, it is evident that no month went by, after April 1963, that did not include a suspect ex-pit transaction of substance between Continental and Allied (Pl. Ex. 253 id., Pl. Ex. 255 id.). This evidence was necessary to refute Continental's contention that the ex-pit registered warehouse receipt financing transactions involving cottonseed oil which it engaged in with Allied were simply a few isolated transactions without meaning or effect on the market (*see* JA 1467a).

and the huge sums of money which Allied disgorged to Bunge. And indeed he did so claim.

Klein's knowledge and the credibility of his testimony were obviously key issues. Accordingly the Trustee called DeAngelis to testify, *inter alia,* about the knowledge of DeAngelis' fraudulent activities obtained by Klein and other Bunge officials during the Harbor Tank incident (pp. 25-27 *supra*). This testimony was excluded (JA 1010a-13a), notwithstanding the Court's recognition that the facts comprising the Harbor Tank incident were relevant and material to the issues at trial (*see* JA 961a, 1014a-21a). Briefly, the facts demonstrated that, as early as September, 1962 defendants Klein and Bunge learned that Allied had pledged to Bunge warehouse receipts representing nonexistent vegetable oil, and that Allied was missing $7,000,000 worth of oil. Bunge officials, including defendant Klein, met with DeAngelis, reviewed the situation and agreed with DeAngelis not to disclose the facts on condition that Bunge be given valid collateral, enabling Allied to continue its operations (pp. 25-27 *supra*).

At all pertinent times during 1962 and 1963, Klein was a member of the Board and the Executive Committee of the Produce Exchange (JA 176a, 181a ¶ 21; JA 1372a). What he learned as a result of the Harbor Tank incident—that Allied was insolvent* and would do anything, including issuing false warehouse receipts, to stay alive—was vital to the proper regulation and management of the Produce Exchange. As a member of the Board, Klein had a fiduciary duty to disclose his knowledge of Allied to the Board, but instead he chose to remain silent in order to protect or otherwise further the selfish interests of Bunge. His breach

* See footnote (*) p. 26 *supra*.

of duty was a continuing one. *See Nichols-Morris Corp.* v. *Morris,* 174 F. Supp. 691, 696-98 (S.D.N.Y. 1959), *appeal dismissed,* 272 F.2d 586 (2d Cir. 1959).

The trial judge excluded the evidence of the Harbor Tank incident, ruling that its admission was barred by a release entered into between the Trustee and Bunge and Klein in settlement of a common-law tort action filed in New Jersey, and additionally that this evidence would be highly prejudicial to defendants (JA 1010a-13a). This exclusion was incorrect and severely prejudiced the Trustee's case.

The release provided that the Trustee would not assert any claim based upon the Harbor Tank incident (JA 960a). However, the Trustee was not seeking to collect damages herein as a result of Klein's involvement in the Harbor Tank incident, nor was he asserting any claim arising therefrom. Evidence of the Harbor Tank incident was proffered at trial solely to demonstrate Klein's knowledge of Allied, to show Klein's state of mind when he purported to regulate the Produce Exchange during 1963 and to impeach his incredible trial testimony that he had no reason to be concerned with conditions on the Produce Exchange during 1963 (*see* JA 950a-58a, 1375a-84a). This evidence should not have been barred. The courts have consistently held that where, as here, one wrongful act is a subject of two or more separate and distinct claims, *evidence* relating to the wrongful act is admissible to support both claims even if one claim had already been judicially determined. *See, e.g., Household Goods Carriers' Bureau* v. *Terrell,* 452 F.2d 152, 157 (5th Cir. 1971); *Woodbury* v. *Porter,* 158 F.2d 194, 195 (8th Cir. 1946).

To the extent the District Court excluded this evidence based upon the possible prejudice to other defendants, its

ruling was erroneous. There was no question of hearsay; and cross-examination was available for all defendants. The Harbor Tank incident was critical to show the state of Klein's knowledge; the other defendants would have been properly protected by a ruling limiting this evidence to Klein and Bunge. Limiting instructions were used throughout the trial and the trial judge expressed his conviction that the jury understood and followed such instructions (*e.g.*, JA 1028a, 1291a, 1325a). Where, as here, the evidence has significant probative value, the Second Circuit has upheld its admission into evidence. *See, e.g., United States* v. *Ravich,* 421 F.2d 1196, 1204-05 (2d Cir. 1970), *cert. denied,* 400 U.S. 834 (1970); *United States* v. *Flynn,* 216 F.2d 354, 365 (2d Cir. 1954), *cert. denied,* 348 U.S. 909 (1955).

3. *Bunge's Further Concerns With Allied's Financial Instability*

In late 1962 and early 1963, Bunge took various steps, all known to trader Klein, to further secure itself in its dealings with Allied. The Trustee attempted to show that Bunge increased its insurance coverage, and finally took out its own policy covering losses for fraud (JA 1292a-93a, 1341a, 1345a). The Trustee further sought to show that Bunge required that oil pledged to it in return for loans be non-fungible and kept in designated tanks, contrary to earlier procedures (JA 1336a, 1337a, 1338a, 1344a). Such evidence was excluded by the Court on grounds of relevance. On the same grounds, the District Court excluded testimony regarding various aspects of Bunge's relationship with Allied, including periodic reductions of the Allied account with Bunge, and Bunge procedures relating to the recording and internal reporting on Allied loans which demonstrated the peculiar and unique financial arrangements Bunge made

with Allied (JA 1339a-40a, 1342a, 1343a, 1349a-50a, 1360a, 1364a). The Court also refused to allow Klein to be questioned about certain aspects of Allied's financial condition (JA 1403a).

Quite apart from the Harbor Tank incident, these facts demonstrate that traders Bunge and Klein seriously doubted Allied's financial stability. Once again, regulator Klein did not disclose this information to the other Board members, even though it was clearly relevant to their assessment of the threat to orderly marketing posed by Allied's inability to finance its huge accumulation of long cottonseed oil futures contracts (*see* JA 1787a-38a). Once again, regulator Klein's failure to do so was in furtherance of trader Bunge's self-interest and constituted evidence of bad faith regulation. The exclusion of this evidence was highly prejudicial to the Trustee's case.

4. *Continental's Dealings With Allied*

Like Bunge, trader Continental also began to doubt Allied's financial stability. Thus, in September, 1962 Continental informed Allied that it would no longer accept Harbor Tank warehouse receipts as collateral.* Trader Continental also expanded its insurance protection on oil pledged to it by Allied as collateral for loans (JA 1444a). Nevertheless, the Trial Court refused to allow the Trustee to explore fully the reasons behind Continental's change in its insurance coverage for oil serving as collateral for its loans to Allied (JA 1444a).

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* Plaintiff was precluded from exploring Continental's knowledge of the Harbor Tank field warehouse operation as a result of the general exclusion of Harbor Tank evidence (JA 1010a). Pre-trial deposition testimony of a Continental officer demonstrates that Continental, mere days prior to the Harbor Tank incident, ceased to accept Harbor Tank warehouse receipts (JA 2145a; R. 328, pp. 29-30).

Moreover, the District Court continuously restricted the Trustee's efforts to fully explore the profitable business relationship between trader Continental and Allied, which of course was relevant to Vogel's motives when he wore his regulator hat on the Produce Exchange. Thus, the trial judge continuously interrupted the Trustee's questioning of Continental witnesses (JA 1444a, 1452a-53a, 1571a, 1580a-81a, 1598a-1600a); precluded questioning concerning the extent of Continental's knowledge of the business relationship between Bunge and Allied (JA 1465a); rejected the Trustee's attempt to develop the significance of Continental's PL 480 relationship with Allied (JA 1591a); limited the Trustee's efforts to demonstrate the significance of Continental's ex-pit transactions with Allied (JA 1589a-90a, 1722a-23a; Pl. Ex. 255 id.); and precluded evidence offered by the Trustee to show that Continental did not lose money on its cash position while making money on its futures position during the November 14th-20th period (JA 1722a-23a).

The District Court's refusal to allow the Trustee to present his case in full against Vogel and Continental was extremely prejudicial.

B. *Regulatory Failures*

As with defendants' bad faith, the Trustee offered additional evidence to show defendants' regulatory failures, which evidence was erroneously excluded by the Court. First, the Court barred the testimony of two significant witnesses from the commodity trade: Robert L. Raclin, plaintiff's trade expert who also had relevant personal knowledge of Allied's activities during 1963; and Perry Moore, a member of the Board of the Clearing Association. The testimony of these men would have established, *inter alia,* that it was common knowledge within the trade that Allied's

activities constituted a manipulation and a threat to orderly marketing on the Produce Exchange during 1963; and, that defendants should have taken meaningful steps to halt that activity.

1. *Robert L. Raclin*

Robert L. Raclin is a senior vice president and head of the commodity department of Paine, Weber, Jackson and Curtis (JA 1920a-21a). In 1963, Raclin was a partner of Bache & Co., a member of the board of directors of the Chicago Board of trade and a governor of its Clearing Corporation (JA 1921a, 1923a). Raclin had vast experience in regulating as well as trading vegetable oil futures; he knew the problems and procedures facing trader-regulators; and, indeed, he was the only unbiased witness who had served as a trader-regulator in 1963. He was prepared to testify at trial, as plaintiff's expert from the trade,* that Allied made improper use of ex-pit transactions to finance registered warehouse receipts and to roll forward maturing futures positions,** that Allied was manipulating the cottonseed oil futures market during 1963, and that its vast accumulation of futures contracts created a threat to orderly marketing conditions which required prompt preventive action by the Produce Exchange (JA 1949a-53a). Mr. Raclin would also have testified that Allied's activities caused a dislocation of oil, affecting prices and spreads in both the cash and

* Plaintiff's other expert witnesses were academicians, and defendants emphasized this fact on a number of occasions (*see, e.g.*, JA 2030a, 2105a).

** See Appendix II *infra*, for Professor Gray's analysis of these transactions. Defendants urged at trial that Professor Gray stood alone in his conclusion that Allied's ex-pit registered warehouse receipt financing transactions were improper and manipulative (JA 2102a-03a). If allowed to testify, Mr. Raclin would have agreed with Professor Gray's analysis.

futures markets, that Allied sold oil at prices lower than it had paid for it (Ct. Ex. 5), and that he and other persons in the trade could and did observe the unusual condition of the vegetable oil markets during 1963 (JA 1943a).

The District Court excluded Mr. Raclin's testimony on the grounds that he had not traded on the Produce Exchange (JA 1934a, 1936a, 1939a) and that he was not an academic.* The inter-relationship of Allied's soybean oil transactions to its activities in cottonseed oil has already been fully discussed (pp. 52-54 *supra*). Mr. Raclin observed Allied's activities on both the Produce Exchange and the Board of Trade (JA 1924a-25a); his testimony as to the observable effects of Allied's trading was clearly relevant to the issues presented below.

The fact that Mr. Raclin never served as a member of the Board of the Produce Exchange, a point that greatly disturbed the trial court (JA 1935a-36a, 1939a), should have been of no moment. All contract markets operated in 1963 under a single statutory scheme, and were subject to the same duties and obligations (JA 200a). Mr. Raclin's services on the Board of Trade, and his review of the By-Laws and Rules of the Produce Exchange prior to trial (JA 1923a-25a), amply qualified him to testify about the duties and responsibilities of the Produce Exchange and its Board

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* Despite the fact that Mr. Raclin had been in the commodity business for 30 years (JA 1920a), had been a partner of two major brokerage and commodity concerns (JA 1920a-21a), had lectured on commodities at many universities including Harvard, Minnesota, Michigan State, Wisconsin and Purdue (JA 1923a), had been a director of the Chicago Board of Trade, the Chicago Mercantile Exchange and was a member of several other exchanges (JA 1922a, 1923a, 1927a-28a), the District Court stated:

> The difference between Dr. Arthur, Gray and Dahl was the fact that they had studied the whole subject and made a study of it all their life, their life's work and they were giving us something in regard to it (JA 1934a-35a).

in 1963. Further, as a director of the Board of Trade, Raclin was familiar with the vegetable oil business in 1963, and was generally in the same regulatory position as the defendants.

With regard to Mr. Raclin's expertise, Rule 702 of the Federal Rules of Evidence states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by *knowledge, skill, experience, training,* or education, may testify thereto in the form of an opinion or otherwise (emphasis supplied).

As Rule 702 indicates, it is not necessary that an expert witness have the academic credentials of a professor; it will suffice if the person has practical experience in the particular area. *See, e.g., Bratt* v. *Western Air Lines, Inc.*, 155 F.2d 850 (10th Cir. 1946), *cert. denied,* 329 U.S. 735 (1946).* Thus, the court in *Santana Marine Service, Inc.* v. *McHale,* 346 F.2d 147, 148 (5th Cir. 1965) stated:

> A person may become qualified as an expert by practical experience. . . . Professional education is not a prerequisite.

The broad discretion accorded a trial judge's determination of a prospective witness's expertise does not act as an umbrella to shield the application of an erroneous legal standard in passing upon credentials. *Reynolds Metals Co.* v. *Lampert,* 324 F.2d 465 (9th Cir. 1963), *cert. denied,* 376 U.S. 910 (1964); *Roth* v. *Bird,* 239 F.2d 257, 261-62 (5th Cir. 1956); *cf. United States* v. *Smith,* 521 F.2d 957, 969 (D.C. Cir. 1975). In *Reynolds Metals Co.* v. *Lampert,*

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* The *Bratt* case was cited with approval by the Second Circuit in *Rich* v. *Ellerman & Bucknall S.S. Co.,* 278 F.2d 704, 707 (2d Cir. 1960).

supra, the trial judge was held to have abused his discretion by excluding the testimony of an experienced chemical engineer who had installed electrostatic precipitators in one industry but not in the particular industry at issue. The Ninth Circuit stated:

> He was qualified in the general field and the trial court abused its discretion in refusing his testimony. His lack of experience with electrostatic precipitators in the aluminum industry was a matter to be considered by the jury in determining his credibility and the weight to be given his testimony. 324 F.2d at 466-67.

See also Roth v. *Bird, supra; Bratt* v. *Western Airlines, supra; Een* v. *Consolidated Freightways,* 120 F. Supp. 289, 293 (D.N.D. 1954), *aff'd,* 220 F.2d 82 (8th Cir. 1955) (A "rule excluding [expert] opinion evidence is to be applied sparingly, if at all, so that the jury may have all the evidence that may aid them in their determination of the facts"). The District Court's exclusion of Mr. Raclin's testimony constitutes reversible error.

2. *Perry Moore*

Perry Moore was the senior member of a firm of cotton merchants and brokers during 1963 and had personal knowledge of the condition of the cottonseed oil futures market (JA 426a, 429a-30a). He was prepared to testify at trial that he and other members of the board of directors of the Clearing Association saw the warning signs and were concerned about the health of the cottonseed oil futures market in 1963 (JA 426a-27a, 429a-30a).

The force of Moore's proposed testimony, as in the case of Raclin, would have been enhanced by his position of relative disinterest during 1963. He was not a member of

the Board of the Produce Exchange, and had no regulatory duties in connection therewith; and he was not active in trading cottonseed oil—either cash or futures. In short, he was not a trader-regulator. His testimony would have demonstrated that the warning signs were so apparent and the dangers so substantial that even non-members of the Produce Exchange were concerned with the Allied problem as early as April 1963 (*see, e.g.,* Pl. Ex. 25 id.). In rejecting Moore's testimony as irrelevant (JA 430a), the trial judge committed serious prejudicial error.

3. ***Other Limitations and Exclusions***

In order to determine whether defendants acted properly in 1963, the jury had to appreciate, as laymen, the significance of the warning signs (see pp. 17-21 *supra*) which the Trustee contended should have spurred the defendants to take meaningful action. Data compilations containing a statistical description of these warning signs were admitted in evidence (Pl. Exs. 122-126). Professor Dahl, a public member of the Board of Directors of the Minneapolis Grain Exchange (JA 261a), prepared charts to illustrate graphically the significance of this complex data (JA 272a-86a; *see, e.g.,* Pl. Exs. 124a id., 125a id., 126d id., 131a id., 133a id.); however, the Trial Court excluded the entire series (JA 355a).

The exclusion of this evidence was manifestly erroneous. Illustrative charts such as Pl. Exs. 124a id., 125a id., 126d id., 131a id., and 133a id. clearly serve a legitimate and useful purpose. *Gordon* v. *United States,* 438 F.2d 858, 877 (5th Cir. 1971), *cert. denied,* 404 U.S. 828 (1971); *United States* v. *Smallwood,* 443 F.2d 535, 540 (8th Cir. 1971), *cert. denied,* 404 U.S. 853 (1971). They have the effect of making the

primary proof upon which such charts are based more enlightening to the jury. *McDaniel* v. *United States,* 343 F.2d 785, 789 (5th Cir. 1965), *cert. denied,* 382 U.S. 826 (1965). This is particularly important when one is dealing in an area as complex as the commodity futures markets and their proper regulation.

The trial court also erred in excluding data compilations reflecting the monthly trading activity and positions of the clearing members during 1963 (Pl. Exs. 130 id., 131 id.; JA 250a-54a, 1630a-32a). These tables describe additional market information concerning concentration which was available to the regulators for the asking (JA 284a-86a). They were rejected by the trial court as (i) immaterial (Tr. 4976); (ii) constituting an impermissible summary of voluminous documents (JA 244a-54a); and (iii) reflecting confidential information not available to the Produce Exchange Board (JA 1629a-32a).

The materiality of such data was clearly established through the testimony of plaintiff's experts (*e.g.,* JA 1704a-12a, 1987a-98a). And, as these same experts made clear, the confidentiality objection was misplaced because such information was always available to regulators in their official capacity (JA 284a-86a, 328a, 389a-97a, 1704a-12a).

Exhibits 130 id. and 131 id. were based on the daily reports filed by the members of the Clearing Association covering their trades in cottonseed oil futures. These records were available to all parties several months prior to trial (R. 270, p. 4; JA 252a, 257a-58a). In addition, plaintiff brought the underlying documents to the Courtroom and was prepared to offer them in evidence, if required. However, the District Court erroneously believed that the rules did not permit introduction of a summary where the

underlying records were too voluminous to be reviewed and absorbed by the jury (JA 251a-54a, 257a-58a). He therefore determined that the exhibits were inadmissible because the very number of underlying documents made then "not capable of being digested" and "incapable of verification" (JA 251a). This was erroneous as a matter of law.

Rule 1006 of the Federal Rules of Evidence allows summaries precisely because the underlying documents are too voluminous to be reviewed and absorbed by the jury. As the Advisory Committee noted, "[t]he admission of summaries of voluminous books, records, or documents offers *the only practicable means* of making their contents available to judge and jury." 5 WEINSTEIN, EVIDENCE ¶ 1006, p. 1006-2 (1975) (emphasis supplied). This proposition is too well settled to require further discussion. *Peter Kiewit Sons' Co.* v. *Summit Const. Co.,* 422 F.2d 242, 267 (8th Cir. 1969); *American Vitrified Products Co.* v. *Wyer,* 221 F.2d 447, 453 (6th Cir. 1955); *United States* v. *Parenti,* 326 F. Supp. 717, 728 (E.D. Pa. 1971), *aff'd,* 470 F.2d 1175 (3d Cir. 1972), *cert. denied,* 411 U.S. 965 (1973). The Trustee's offer of Exhibits 130 and 131 fell squarely within Rule 1006; it was an abuse of discretion to exclude them.

* * *

In sum, the District Court's various exclusionary rulings, covering exhibits and testimony, including expert opinions, deprived the Trustee of his right to a fair trial. These rulings not only exceeded the bounds of judicial discretion but they resulted from the application of erroneous legal standards. Individually, these exclusionary rulings constituted prejudicial error. Cumulatively, they require that plaintiff receive a new trial.

POINT III

THE COURT BELOW ERRED BY ADMITTING DEFENDANTS' EXHIBIT 1-A

The District Court presented to the jury, as the very first issue for it in the case, whether there was a manipulation by DeAngelis on the Produce Exchange during 1963.*

The Trustee, fully recognizing the significance of the issue, dealt with it, during the trial, in a time-honored fashion. He presented, through records and witnesses, the facts concerning DeAngelis' activities, their impact on the market, the condition of the market, and all of the observable market indicia of DeAngelis' activities.** Having provided the jury with the facts upon which the jury could determine whether there was a manipulation, the Trustee proceeded to introduce expert testimony showing that these facts, in the opinion of qualified experts, constituted a manipulation or threat to orderly marketing. The Trustee's experts on this subject, Professors Roger Gray and Paul Farris, concluded that, based upon the facts adduced, DeAngelis had engaged in a manipulation and that his activities constituted a threat to orderly marketing (*e.g.*, JA 1642a, 1669a-70a, 2009a-2010a).

The Court below expressly invited the defendants to subject the Trustee's experts to vigorous "no holds barred"

* See Special Verdict form, Question No. 1 (Ct. Ex. 4).

** *See, e.g.*, JA 264a-65a, 270a, 341a-42a, 363a-70a, 415a, 435a, 438a-39a, 514a-15a, 1032a-34a, 1045a-55a, 1083a-85a, 1088a, 1094a, 1113a, 1130a, 1642a, 1663a-64a, 1669a-77a, 1695a-98a; Pl. Exs. 9a-e, 10(c), 10(g), 122-127, 255a-d, 260a-f.

cross-examination (JA 1747a, 1750a). The defendants accepted the Court's invitation and cross-examined the Trustee's experts for days (Tr. 4580-4756, 4767-4856, 4916-4947, 4954-55, 5803-5934, 5967-6002, 6008; *see, e.g.,* Tr. 249-340, 352-55, 793-845).

To counter the live and cross-examined expert opinions presented by the Trustee on the question of manipulation and orderly marketing, the defendants relied mainly upon a written opinion by an unknown author or authors—namely, Defendants' Exhibit 1-A. Exhibit 1-A, an unsigned, undated report emanating from the CEA, is an interwoven amalgam of what purports to be "facts" and, more importantly, explicit "Conclusions" * which are nothing less than opinions purporting to contradict the opinions of the Trustee's experts—and that is precisely why the document should never have been admitted. The principal "Conclusion" is the Report's opinion that:

> it is not reasonable to believe that . . . Allied would attempt to corner the oil markets or attempt to manipulate oil futures prices. . . .

This is an opinion—not a fact.**

The District Court admitted the anonymous written opinion on this critical issue under the newly enacted Rule 803 (8) of the Federal Rules of Evidence, with no one ever taking the stand in its support.

Thus, on the very first issues presented to the jury—manipulation and disorderly marketing, and DeAngelis'

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* See Exhibit 1-A, pp. 29-30.

** *Texas Continental Life Ins. Co.* v. *Dunne,* 307 F.2d 242, 248 (6th Cir. 1962); *Rucker* v. *Bolles,* 80 F. 504, 508 (8th Cir. 1897); *United States* v. *Mitchell,* 385 F. Supp. 1190, 1193 (D.D.C. 1974).

motivation with respect thereto—the Trustee was confronted with a written opinion which he could subject to neither *voir dire* nor cross-examination. The Trustee could not examine into, among other things:

—the identity of the persons who had rendered the conclusory opinions on manipulation and motivation

—the qualifications and expertise of the persons who had rendered the conclusory opinions on manipulation and motivation

—the interest of the persons who had rendered the conclusory opinions on manipulation and motivation

—the degree of research and investigation conducted by the persons who had rendered the conclusory opinions on manipulation and motivation

—the materials considered by the persons who had rendered the conclusory opinions on manipulation and motivation

—the materials ignored, consciously or otherwise, by the persons who had rendered the conclusory opinions on manipulation and motivation

—who had selected the persons who had rendered the conclusory opinions on manipulation and motivation

—why the persons who had rendered the conclusory opinions on manipulation and motivation were selected as distinguished from other persons

—other persons who may have been consulted by the persons who had rendered the conclusory opinions on manipulation and motivation

—the conclusions of the experts, if any, who may have been consulted by the persons who had rendered the conclusory opinions on manipulation and motivation

—all of the circumstances surrounding the request for and preparation of the report

—the reasons why the report was amended, at least once, on such critical issues as the bona fides of Allied's ex-pit trades

—the nature of the agency spawning the report

—the reasons why the circulation of the report was severely limited, and apparently never made "public"

—the degree of interference or involvement, if any, in the preparation of the report by industry representatives as well as representatives of the Executive and Legislative branches of Government

—the reasons why the so-called attestation nowhere states whether this was a "final" report

—the reasons why the report was not located during early stages of discovery in this case.

The Trustee was virtually helpless in attacking this written opinion, the admission of which violated every precept of admissibility.*

The prejudice to the Trustee was blatant.** Exhibit 1-A was not introduced by the defendants for the purported

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* Wholly deprived of a meaningful opportunity to challenge the opinion, the Trustee was limited to a collateral attack on the report based upon the testimony of Professor Gray, hurriedly and unexpectedly recalled on the Trustee's rebuttal case (JA 1977a-80a). Unfortunately, he shared with plaintiff, the Court and defense counsel (JA 2019a-21a) a lack of knowledge concerning the identity or expertise of the author of the report, the method by which the study described therein was conducted, the source of the materials on which the report was based and the manner in which the report was prepared, and was thereby severely limited in his ability to analyze it critically (JA 2033a-93a, especially 2050a-61a; *see also* JA 2017a-18a [Farris]). *See Franklin* v. *Skelly Oil Co.,* 141 F.2d 568, 572 (9th Cir. 1944).

** Significantly, it was on the grounds of possible prejudice that the Court excluded the highly probative and relevant evidence concerning the Harbor Tank incident discussed above (pp. 54-57 *supra*).

"facts" which it contained; it was introduced for its "Conclusion." The "Conclusion" was read to the jury (JA 1972a-1976a). Moreover, the defendants referred to this "Conclusion" time and again in their summation to the jury (JA 2099a-2100a, 2101a, 2102a-03a, 2104a, 2106a-07a), and, indeed, the jury itself called for this Exhibit during its deliberations (JA 2123a; Ct. Ex. 2). If anything, the prejudice was enhanced by the fact that the opinion was that of the "Government."

In and of itself, the admission of a written opinion on a crucial issue through the vehicle of Exhibit 1-A constituted one of the most severe prejudices suffered by the Trustee during the course of the trial. The ease with which the District Court admitted an anonymous opinion on a critical issue is to be contrasted with his flat refusal to allow one of the Trustee's experts, Mr. Raclin, to testify at all, because he was not an "academic" (see discussion at pp. 60-63 *supra*).

A. *Exhibit 1-A Should Have Been Excluded Under Rule 403*

The severe prejudice to the Trustee of admitting this anonymous document, which could be subjected to neither *voir dire* nor cross-examination, relating to what the District Court viewed as the *sine qua non* of the Trustee's case, is manifest as described above. Rule 403 of the Federal Rules of Evidence requires its exclusion.

Rule 403 of the Federal Rules of Evidence provides in pertinent part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .

That the "opinion" emanated from a Government agency had to enhance its impact on the jury. Defendants empha-

sized to the jury this "official" aspect of Exhibit 1-A (JA 2099a-2100a, 2102a-03a, 2104a, 2106a-07a). This further prejudice to the Trustee is clear, as is the misleading effect of such a document, without the engine of cross-examination to place it and its authors, whoever they may be, in proper perspective for the jury.

Moreover, Exhibit 1-A appears to be a report by the federal agency charged with overseeing the very market on which the manipulation occurred. That agency did little or nothing to stop the events which led to corporate and personal bankruptcies, destroyed careers, fostered litigation of all varieties and cast a cloud over commodities trading which may not yet be dispelled.* Why would one doubt that when, some unknown time after the events, that agency wrote a report as to whether there was a manipulation, it would do anything less than justify its inaction. See pp. 81-82 *infra*. Have we not learned enough following the era of Watergate to at the least recognize that to preserve our democratic system we cannot succumb numbly to a concept of Governmental infallibility? This report and its opinions cried out for the sunshine of *voir dire* and cross-examination before it was admitted and turned over to the jury.

Leaving aside specific objections to its admissibility, the grave prejudice to the Trustee's case caused by the introduction of Exhibit 1-A is precisely why it should have been excluded under Rule 403.

B. *Exhibit 1-A Fails to Qualify for Admission Into Evidence*

Defendants' Exhibit 1-A constitutes hearsay as defined by Rule 801 of the Federal Rules of Evidence. Exhibit 1-A is

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* *See generally*, N. Miller, The Great Salad Oil Swindle (1965).

therefore inadmissible unless it falls within an exception provided by the Federal Rules of Evidence or other applicable authority. Federal Rules of Evidence Rule 802. The Court below admitted Exhibit 1-A as a public record or report pursuant to Rule 803(8) of the Federal Rules of Evidence. This Rule provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * *
>
> (8) Public records and reports—Records, reports statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . . or (C) . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Exhibit 1-A fails in every respect to qualify for admission into evidence pursuant to this Rule.

We submit that it would come as a great shock to the draftsmen of the Federal Rules of Evidence to discover that purported expert opinions could be presented to a jury merely by waving before it a sheet of paper reflecting naked conclusions written by an unknown author, of unknown credentials in unknown circumstances.* And yet,

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* Contrary to this painless but highly prejudicial way of getting before the jury expert testimony, the District Court required the Trustee to lay an extensive foundation for his expert testimony and to restrict such testimony to conclusions reached from material in the record (JA 1644a, 1649a-50a, 1651a). Although the Trustee's counsel pointed out that limitation of an expert's opinion to documents in the record was not appropriate, the Court nevertheless persisted in such restriction as to the Trustee's experts (*see* JA

this is precisely what defendants accomplished through the admission of Exhibit 1-A under the hearsay exception for public records set forth in Rule 803(8).

Rule 803(8) was never intended to serve as a substitute, in circumstances such as this, for live testimony at trial— and to deprive an opponent of the right to cross-examination on such matters of opinion and conclusions as were here involved.* Neither the language of the Rule nor its history requires such a result. If anything, they are to the contrary. The language of the Rule itself refers to matters of observation and factual findings; that is, to information not subject to the risks, the differences in view, and the value judgments inherent in opinions rendered by an expert. The exception was intended to apply only to information which could not reasonably be expected to be

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1934a). Clearly, to the extent that this standard was applied to the Trustee's experts, there is no reason why it should not also have been applied to defendants. The opinions and conclusions reflected in Exhibit 1-A were challenged by the Trustee's experts. To the extent that they were predicated on material not reflected in Exhibit 1-A, the Court's rulings on the standards applicable to the Trustee and defendants were not only inconsistent but hampered the ability of the Trustee's experts to effectively dispute the opinions and conclusions in Exhibit 1-A and were therefore highly prejudicial.

* Rule 705 permits testimony in the form of an expert opinion without prior disclosure of the foundational facts *upon the assumption that the cross-examiner may himself elicit and attack the factual foundation. See* Advisory Committee's Note, 3 WEINSTEIN, EVIDENCE ¶ 705, pp. 705-2, 705-3 (1975). Moreover, the trial judge underscored the importance of the ability to cross-examine on the factual foundation of an expert's opinion when he required the Trustee to lay the factual foundation for Professor Gray's opinion so that the defendants could cross-examine him intelligently. (JA 1650a). But the Trustee had no opportunity to challenge the factual foundation of Exhibit 1-A because there was no one to cross-examine. Thus, it was not only palpably unfair for the Court to require a factual foundation solely in the case of the Trustee's witnesses, but it also contravened the clear import of Rule 705 that expert opinion be subject to cross-examination.

subject to challenge as to its accuracy or reliability. To hold otherwise and to extend the exception of Rule 803(8) to encompass expert opinion testimony and conclusions on a critical issue in a case such as this would not only abrogate all evidentiary rules but for all practical purposes would constitute a denial of due process.

The Court below clearly misconstrued the purport of Rule 803(8) and assumed that any document indicated as having emanated from the files of a Government agency was thereby entitled to be admitted as an "official record" pursuant to Rule 803(8).* In other words, it assumed that

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* Defendants compounded their egregious abuse of Rule 803(8) by failing to establish the condition precedent to admissibility of a document purporting to be a public record or report; namely, that the document so certified is an "official record." See Federal Rules of Evidence Rule 902, Federal Rules of Civil Procedure Rule 44; 28 U.S.C. § 1733. Nowhere does the Exhibit's attestation indicate that 1-A is such an official report. Based on the attestation there is no way of knowing whether this is the final and complete report of the CEA on the DeAngelis affair. Further, neither of the individuals who executed the certificate annexed to defendants' Exhibit 1-A has attested either "expressly or by implication to the genuineness of the original in his custody from which the copy is made." 7 WIGMORE, EVIDENCE § 2158, pp. 626-27 (3d Ed. 1940). Neither of these individuals could so attest since both were employed by the CFTC and knew only that Exhibit 1-A was a document found in the files of a predecessor agency, the CEA, and had been transferred to the CFTC pursuant to statute. *See United States* v. *Dibble,* 429 F.2d 598, 602 (9th Cir. 1970). Mere certification that a document is a true and complete copy cannot be used to bootstrap the underlying document into an official record. *See Block* v. *United States,* 7 Ct. Cl. 406, 413-14 (1871); *cf. United States* v. *7 Cases, Cracker Balls,* 253 F. Supp. 771, 774 (S.D. Tex. 1966).

The defendants failed to cure this problem by their oblique use of an affidavit of Alex C. Caldwell dated June 24, 1976 (one of three affidavits comprising Def. Ex. 107 id.). Defendants *never offered* this affidavit in evidence; and yet the District Court apparently relied on this document to show that Exhibit 1-A was an official record capable of authentication (JA 1916a-17a, 1954a-55a).

A review of the Caldwell affidavit demonstrates nothing to show that the findings of a CEA investigation were embodied in any

authentication as an official record automatically and without more allows a document to be admitted. This, however, is not the law. At most, in appropriate circumstances—not present here—the "official" nature of a record overcomes the hearsay objection to admissibility. The document remains subject to the full panoply of other evidentiary rules, and only when the document complies with those rules may it be admitted into evidence. *Atlantic Mut. Ins. Co.* v. *Lavino Shipping Co.,* 441 F.2d 473, 475 (3d Cir. 1971); *United States* v. *Verville,* 355 F.2d 527, 530 n.5 (7th Cir. 1965); *Matthews* v. *United States,* 217 F.2d 409 (5th Cir. 1954).

Exhibit 1-A failed to comply with these evidentiary rules in a number of respects.

First, it violated the common law rule that a properly authenticated official report must be based upon first-hand knowledge. Second, it contravened the provision of Rule 702 of the Federal Rules of Evidence that such a report, to the extent it contains expert opinions and conclusions, must be qualified. Third, the underlying documents furnishing the basis of the opinions and conclusions contained in the report were themselves not subject to examination as required by Rule 1006. Fourth, in violation of the very language of Rule 803(8) itself, the circumstances relating to preparation of the report were highly suspect and untrustworthy.

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official report; and certainly nothing to show that any such findings were embodied in defendants' Exhibit 1-A. Assuredly, the facts stated therein were not "established and uncontroverted." *See, e.g., Ellis* v. *Cates,* 178 F.2d 791, 793 (4th Cir. 1949), *cert. denied,* 339 U.S. 964 (1950). Accordingly, such assertions were in no way susceptible to judicial notice within the meaning of Rule 201 of the Federal Rules of Evidence. Hence, the District Court erred in assigning any credit whatever to the so-called Caldwell affidavit.

1. *Exhibit 1-A Is Not Based Upon First-hand Knowledge*

Rule 803(8) is a codification of the "government report" exception to the hearsay rule, an exception rooted in common law. McCormick, Evidence § 315 (2d ed. 1972). While this exception can obviate the need for a personal appearance by the official who authored the report, the document nonetheless must concern matters to which the official could testify if he were called to the witness stand. *Olender* v. *United States,* 210 F.2d 795, 801 (9th Cir. 1954); *Vanadium Corp.* v. *Fidelity & Deposit Co.,* 159 F.2d 105, 109 (2d Cir. 1947). The Advisory Committee's Note to Rule 803(8)(C) makes it quite evident that no change in this time-honored requirement was intended. 4 Weinstein, Evidence ¶ 803, pp. 803-32, 803-33 (1975). As the Ninth Circuit stated in *Olender*:

> Since the official documents are a substitute for the personal appearance of the official in court, it is generally held that such documents, to be admissible, must concern matters to which the official could testify if he were called to the witness stand. . . . Thus, this circuit and most of the other circuits which have passed on the question have held that the facts stated in the document must have been within the personal knowledge and observation of the recording official or his subordinates, and that reports based upon general investigations and upon information gleaned secondhand from random sources must be excluded. 210 F.2d at 801 (citations omitted).

See also Colvin v. *United States,* 479 F.2d 998, 1003 (9th Cir. 1973); *Yung Jin Teung* v. *Dulles,* 229 F.2d 244, 247 (2d Cir. 1956), *citing Vanadium Corp.* v. *Fidelity & Deposit Co., supra; Lomax Trans. Co.* v. *United States,* 183 F.2d 331, 333-34 (9th Cir. 1950).

Defendants totally and completely failed to lay a foundation for the admission of Exhibit 1-A with respect to the requirement for firsthand knowledge. The Exhibit does not reflect the source of its many factual statements, controvertible opinions or conclusions* and defendants offered no independent evidence with respect thereto.** Further, there has been *absolutely no showing* that the opinions and conclusions in the report, or indeed even the so-called factual data, were within the personal knowledge and observation of the unknown reporting official or his unknown subordinates.*** On the contrary, the opinions and conclusions contained in the report clearly were not within the personal knowledge and observation of whomever the author was—they were in the nature of expert testimony. Moreover, as discussed below, there was no qualification of the putative expert.

2. *Exhibit 1-A Fails to Qualify the Unknown Author as an Expert in the Subject Areas of the Report*

Opinions and conclusions of an expert nature permeate Exhibit 1-A. As noted, it was precisely for these opinions and conclusions, rather than for the facts by way of statistical data, that the document was offered by defendants.

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* And as Professor Gray has pointed out, some of the conclusions are wrong on their face. (JA 2051a-54a).

** Examples of unsupported statements and conclusions contained in Exhibit 1-A include (a) the bald statement that ex-pit transactions "had no direct effect upon the course of futures prices" (p. 18, ¶ 2); (b) the discussion of licensed warehouse capacity in footnote 9, p. 28, and (c) the conclusions based upon presumptions and expectations, such as those contained in the last paragraph on p. 28, the first paragraph on p. 29 and the last paragraph on p. 30.

*** The hearsay statements reflected in the Caldwell affidavit (Def. Ex. 107 id.) cannot and do not cure this fatal deficiency.

Even assuming *arguendo* that expert opinion of the kind involved here could be admitted without the opportunity to examine the alleged expert, the expertise of the author would nevertheless have to be established. Here, neither the report itself nor defendants established that the author or authors of the report, if called to testify in person, were qualified to give such expert opinions. On this ground alone, the report should have been excluded. *Franklin* v. *Skelly Oil Co., supra; see Standard Oil Co.* v. *Moore,* 251 F.2d 188 (9th Cir. 1957), *cert. denied,* 356 U.S. 975 (1958); *Colvin* v. *United States, supra.*

3. *The Admission of Exhibit 1-A Circumvented the Safeguards of Rule 1006*

Rule 1006 of the Federal Rules of Evidence provides:

> The contents of voluminous [underlying documents] which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. *The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court* (emphasis supplied).

Defendants' Exhibit 1-A contains numerous charts and data compilations purporting to summarize voluminous underlying documents of unknown origin. At no time did defendants attempt to make available to the Trustee, for purposes of examination or copying, either the originals or duplicates of these underlying documents. Nor were these underlying documents produced in Court.

During trial the Trustee challenged the accuracy of various data compilations and summaries contained in Exhibit

1-A as well as the conclusions based thereon. Had the underlying documentation been made available by defendants to the Trustee in accordance with Rule 1006, the Trustee would have been in a position to document his objections to the Exhibit based on its lack of accuracy. The effect of the trial court's admission of Exhibit 1-A was to circumvent the safeguards of Rule 1006 and relegate the Trustee to a mere facial challenge to the conclusions set forth therein without any opportunity to examine the data on which such conclusions presumably were based. As a result, the Trustee's ability to effectively challenge the opinions and conclusions based on such data was also significantly impaired (*see, e.g.,* JA 2018a-21a, 2058a-61a).*

4. *The Sources of Information and Other Circumstances Surrounding Exhibit 1-A Indicate Lack of Trustworthiness*

Assuming *arguendo* that expert opinion of the kind here involved falls within the intendment of Rule 803(8), nevertheless in the circumstances herein involved admission of Exhibit 1-A was inappropriate. By its very language, the public records and reports exception to the hearsay rule

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* The District Court's willingness to admit defendants' Exhibit 1-A, may be contrasted with its refusal to admit many of the Trustee's charts summarizing voluminous underlying documents (*see* JA 1919a; *see also* Point II pp. 65-66 *supra*). Further, the trial court admitted defendants' Exhibit 1-A notwithstanding the fact that it is replete with discussions and comparisons of cottonseed oil with other oils (*see* Exhibit 1-A, pp. 2, 5, 7-10, 12-13, 16-17, 19, 22-24, 29-30, and various appendix charts) whereas the Court excluded much of plaintiff's soybean oil evidence when offered (see Point II pp. 52-54 *supra*). Plaintiff was forced to withdraw its objection to Exhibit 1-A's references to soybean oil evidence so that Professor Gray could at least attempt the inherently difficult task of evaluating the report in a comprehensible manner (JA 2035a-38a, 2041a-42a, 2047a-50a).

made available by Rule 803(8) of the Federal Rules of Evidence is conditioned upon the trustworthiness of the sources of information and other circumstances surrounding the report. Exhibit 1-A fails to qualify for treatment pursuant to Rule 803(8) because the sources of information contained in the report and other circumstances indicate an overriding lack of trustworthiness.

The Advisory Committee Note to Rule 803(8)(C) states:

> Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, . . . (2) the special skill or experience of the official, . . . (3) whether a hearing was held and the level at which conducted, . . . (4) possible motivation problems suggested by *Palmer* v. *Hoffman,* 318 U.S. 109. . . . Others no doubt could be added. 4 WEINSTEIN, EVIDENCE ¶ 803, p. 803-45 (1975).

As already pointed out, defendants made no effort to show that Exhibit 1-A was the product of a timely investigation; they could not have done so since they did not know when it was prepared (JA 2077a). In the absence of the report's author, the Trustee could not probe this area. The Trustee similarly was prevented from exploring the "special skill or experience" of the report's author. To the limited extent that the report's sources are revealed, Exhibit 1-A clearly indicates that it resulted from the gathering of secondary information.

Most significantly the vital conclusion as to Allied's intent, a question critical of the issue of manipulation, was itself merely assumed, and assumed in the face of contrary testimony by DeAngelis (*e.g.,* JA 1045a-47a, 1050a-51a, 1088a)—the person whose intent was in question (JA 2058a-60a).

Furthermore, the circumstances surrounding Exhibit 1-A raise the most serious questions concerning the reasons for

its preparation and cast doubt on its objectivity. The Trustee offered to show that Exhibit 1-A was an after-the-fact, self-justification prepared in the wake of severe Congressional criticism of the CEA's inadequate, if not inept, handling of the DeAngelis affair. *See, e.g.,* GAO Report. Exhibit 1-A was not published; instead it was circulated in a tightly controlled manner to no more than fourteen government persons* and may well have been suppressed during plaintiff's discovery proceedings (JA 1917a). The report was amended, without explanation, on an aspect essential to this case—the legitimacy of Allied's ex-pit transactions.** The CEA and its activities with respect to the matters covered in the report were the subject of challenge by another arm of the Department of Agriculture—the Office of the Inspector General—whose report the District Court refused to allow into evidence when offered by plaintiff.*** Such circumstances hardly furnish the trustworthiness contemplated for application of Rule 803(8).

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* According to a Distribution and Control sheet, made a part of Exhibit 1-A, most of the 108 copies of the Report were "taken to attic" on December 29, 1966.

** See memorandum from Caldwell to George Mehren, dated March 18, 1964, annexed to Exhibit 1-A.

*** At the time the Court admitted Exhibit 1-A, plaintiff offered the OIG Report (Def. Ex. 211 id.). It was rejected by the Court (JA 1815a). The OIG Report analyzed the CEA's role in the DeAngelis debacle and concluded that the CEA was somewhat ineffectual (Def. Ex. 211 id., p. 4). Thus, the OIG Report noted that the CEA's New York office advised CEA Washington that they doubted that DeAngelis' ex-pit trades were a proper function in a free market, but no action was taken (Def. Ex. 211 id., p. 49). Compare this to the revision in Ex. 1-A whereby the CEA, in an unexplained, undocumented amendment to the report, *withdrew* its serious question as to the *bona fides* of Allied's ex-pit trading.

The OIG Report also cites a CEA New York official stating that the volume of ex-pit trading may have had the effect of keeping

Exhibit 1-A utterly failed by any test or standard to meet the prerequisites required for its admissibility. The prejudice to the Trustee's case was overwhelming. Accordingly, the District Court's decision to admit Exhibit 1-A, over plaintiff's objections, constitutes reversible error.

POINT IV

THE DISTRICT COURT IMPROPERLY CHARGED THE JURY AND THEREBY SEVERELY PREJUDICED THE TRUSTEE'S CASE

The District Court's jury charge compounded many of the serious errors committed by the Court during the course of the trial. The most prejudicial errors in the charge included: (a) the refusal to instruct the jury that in light of defendants' overriding statutory duty to protect the public interest, Haupt's alleged contributory negligence was irrelevant; (b) the refusal to instruct the jury to consider whether defendants acted recklessly, and if so to disregard Haupt's alleged contributory negligence; (c) the failure to properly define scope of authority when it instructed the jury that they could find Haupt to be contributorily negligent if they found that Haupt's employee acted negligently; (d) the erroneous instruction that defendants could only be held liable for their conduct during the period November 14-20 if their actions were "patently unreasonable"; and (e) the failure to charge that defendants, as a matter of law, had the primary responsibility

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prices at a high level (Def. Ex. 211 id., p. 48), contradicting the flat statement in Exhibit 1-A that ex-pit transactions "do not have a price effect upon futures prices" (Def. Ex. 1-A, p. 20).

If the Court was determined to admit Def. Ex. 1-A despite its infirmities, it should, as a matter of basic fairness, have admitted Def. Ex. 211 id., so that the jury could have a more complete picture of the murky role of the government in this fiasco.

to prevent manipulations and to maintain orderly marketing conditions, and were not entitled to rely upon the inaction of the CEA as a defense to the Trustee's claims.

A. *The Produce Exchange Had an Overriding Statutory Duty to Regulate the Market; Accordingly, the Court Should Have Instructed the Jury to Ignore Haupt's Alleged Contributory Negligence*

The Trial Court erroneously refused to charge that the Produce Exchange's overriding statutory duty to regulate the market vitiated any alleged contributory negligence on the part of Haupt (JA 2117a-20a). During the trial, defendants vigorously argued that Haupt was contributorily negligent and should therefore be barred from recovery. Much of their proof and most of their advocacy were directed towards this issue. Essentially, they urged that Jack Stevens, head of Haupt's commodity department, allowed Haupt to accumulate an unduly large position on behalf of Allied, a position which Haupt could not support in the event of a market decline, and that it was Stevens' conduct, not their own regulatory failures, which brought about Haupt's losses.

In its charge, the court below applied the traditional common law doctrine of contributory negligence whereby the plaintiff is barred from recovery if he is negligent to the slightest degree. The jury was instructed:

> If you find that any acts or omissions on the part of Ira Haupt and Company, or of Haupt's officers or employees, acting within the scope of their employment, are a proximate cause of Haupt's injuries, then you must find in favor of the defendants (JA 2116a).*

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* This charge was subsequently incorporated in Special Verdict Question No. 7:

> . . . have the defendants proved by a fair preponderance of the evidence that the action or inaction of Ira Haupt & Co.

This charge was erroneous. The jury should have been instructed that because defendants had a statutory duty imposed by federal law, they could not escape liability even if Haupt was negligent, unless they found that Haupt's conduct was the *sole* cause of its losses.

The Commodity Exchange Act was designed to protect the integrity of the futures markets. Congress, in permitting these markets to regulate themselves, imposed upon them the duty to promulgate and enforce rules and regulations designed to protect investors, brokers and the markets themselves. Furthermore, under the statutory scheme, it was vital that the commodity exchanges exercise the highest degree of care in as much as the CEA in 1963 did not exercise that degree of surveillance that the SEC exercised over the stock exchanges. *See, e.g.,* Act § 5; *see also* S. Rep. No. 93-1131, 1974 U.S. Code & Cong. Admin. News 5843, 5855 ("A condition of such designation [as a contract market] was that the *exchanges themselves would take major responsibility for the prevention of price manipulation . . .*" [emphasis added]).

It is precisely because of this paramount public interest that the courts have recognized an implied private right of action under the Act. Facilitating private actions ensures that those charged with the responsibility for insuring an orderly market, free from manipulation, will diligently perform their duties. *See, e.g., Deaktor* v. *L. D. Schreiber & Co.,* 479 F.2d 529, 534 (7th Cir. 1973), *rev'd on other grounds sub. nom. Chicago Mercantile Exchange* v. *Deaktor,* 414 U.S. 113 (1973); *Johnson* v. *Espey,* 341 F. Supp. 764, 766 (S.D.N.Y. 1972); *see J.I. Case Co.*

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either prior to or subsequent to November 14, 1963, was also a proximate cause of its own injury?

IF YOUR ANSWER TO THIS QUESTION IS "YES", YOU MUST FIND FOR THE DEFENDANTS. (Ct. Ex. 4).

v. *Borak,* 377 U.S. 426, 432-33 (1964). The courts have also recognized that where such an important public interest is fostered by private litigation, relief should not be barred by the invocation of traditional common law doctrines. *See, e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 138 (1968); *Pearlstein* v. *Scudder & German,* 429 F.2d 1136, 1143 (2d Cir. 1970), *cert. denied,* 401 U.S. 1013 (1971), *appeal after remand,* 527 F.2d 1141 (2d Cir. 1975); *American Bank & Trust Co.* v. *Joste,* 323 F. Supp. 843, 846-47 (W.D. La. 1970); *Johns D. Hopkins University* v. *Hutton,* 297 F. Supp. 1165, 1221-22 (D. Md. 1968), *modified,* 488 F.2d 912 (4th Cir. 1973), *cert. denied,* 416 U.S. 916 (1974). This is in accord with the growing tendency of the states to reject totally the defense of contributory negligence. *See, e.g.,* N.Y. C.P.L.R. § 1411 *et seq.* (McKinney Supp. 1975).

If the defendants had regulated the cottonseed oil futures market properly, Allied's manipulation would have been halted long before Haupt came into the picture (JA 1699a-1701a, 1775a-76a; Pl. Exs. 131 id., 131a id., 219c id.). In light of the Act's purpose to protect the public, the brokers and the exchanges themselves from manipulations and threats to orderly marketing conditions, defendants cannot be permitted to foist the consequences of their regulatory failure onto Haupt, particularly since the loss to Haupt was readily foreseeable to them.

These circumstances call for application of a legal standard which insures stringent enforcement of the Act, for it is only such a standard which will instill national confidence in the commodity exchanges, guarantee fair dealings and honest practices, and provide the impetus for private enforcement as a necessary supplement to governmental action. The Court's failure to properly instruct the jury on this issue is reversible error.

B. *The District Court Erred by Refusing to Instruct the Jury on the Issue of Defendants' Reckless Conduct*

Despite the fact that there was substantial evidence in the record, the Court refused to charge the jury with respect to the Trustee's allegation that the defendants acted recklessly (R. 280; JA 2098a). By rejecting this charge the Trial Court essentially directed a verdict on this issue.

A person acts recklessly when he intentionally and unreasonably does an act of known risk or where the risk is so obvious that his knowledge of it must be assumed. *See, e.g., People* v. *Eckert,* 2 N.Y.2d 126, 130-31 (1956); Restatement (Second) of Torts § 500, p. 185 (1965); Prosser, Law of Torts § 34 (4th ed. 1971). Prior to November 14, defendants ignored clear warning signs of Allied's manipulation and threat to orderly marketing (see pp. 17-28, 31-35 *supra*). By November 14th, the defendants had conclusive information that trading on the Produce Exchange was disorderly and that DeAngelis was manipulating the market (see pp. 35-38 *supra*). The risk of a market collapse was enormous, and the situation was urgent. Instead of acting promptly and decisively, defendants appointed a Control Committee which leisurely mailed out a request for information that the Produce Exchange either did not need, or in any event, already had (see pp. *supra* 37-40). The Control Committee never met, even while the market collapsed. It was only when their own self-interest was threatened on November 19th that the defendants saw fit to take action (see generally pp. 41-43 *supra*).

The District Court's ruling deprived the jury of the opportunity to determine that defendants' conduct was in reckless disregard of their statutory duties. This seriously prejudiced the Trustee's case, because had the jury found defendants to have acted recklessly, Haupt's conduct, even

if it amounted to contributory negligence, would not have barred the Trustee's recovery. RESTATEMENT (SECOND) OF TORTS § 503 (1965); PROSSER, LAW OF TORTS § 65, p. 426 (4th ed. 1971); *see, e.g., Thompson* v. *Pennsylvania Power Co.*, 402 F.2d 88 (3d Cir. 1968).

Under a proper instruction concerning recklessness, the jury would have been advised that if they found defendants to have acted in reckless disregard of their duties, then they should ignore the allegations of Haupt's contributory negligence. The failure to so instruct the jury once again unfairly and prejudicially burdened the Trustee's case.

C. *The District Court Further Erred by Failing to Properly Charge With Respect to Whether Jack Stevens' Conduct Was Attributable to the Trustee*

Throughout the trial the defendants introduced evidence which they claimed indicated that Haupt's employee, Jack Stevens, was negligent (*See, e.g.*, Trustee's Proof of Claim, Def. Ex. 5; Trustee's Answers to Interrogatories in *Seligson* v. *Fidelity & Casualty Co.* ["Def. Ex. 3"]). However, Stevens' conduct was not attributable to the Trustee since Stevens acted outside the scope of his employment and, indeed, contrary to his authority, as well as against the best interests of Haupt (Def. Ex. 3, Answer to Interrogatory No. 67).

Jack Stevens was a senior supervisory employee of Haupt during 1963. After July, 1963 he supervised Haupt's commodity department (JA 1844a-45a). As such, Stevens had the approval of the Haupt partnership to make decisions regarding Haupt's financing of Allied only so long as he complied with the terms and conditions of the Letter of Intent (Def. Ex. 15) under which Haupt agreed to extend limited financing to Allied. Stevens was not a partner

of Haupt; thus the authority delegated to him was limited. He was not given authority to make major decisions with respect to the Allied accounts without the knowledge and prior approval of the Haupt partners. He was required to reveal to the partners all material facts and circumstances of the Allied accounts (Def. Ex. 3, Answer to Interrogatory No. 67, JA 1005e-06e; Def. Ex. 15).

Stevens repeatedly failed to fulfill these obligations. Instead of reporting to the Haupt partners, he concealed the important facts. In addition, he acted illegally and certainly contrary to Haupt's best interests (JA 1880a-86a, 1891a-94a, 1895a).

The very same exhibits offered by defendants to show that Stevens acted negligently also show that many of Stevens' acts were illegal and contrary to Haupt's interests. *See*, e.g., Def. Ex. 3, Answers to Interrogatories Nos. 65 and 66. The Proof of Claim (Def. Ex. 5) at pp. 7-9 points out that Stevens acted in willful disregard of Haupt's interests, that his actions evidenced infidelity to Haupt and breaches of the trust and loyalty reposed in him by Haupt and that he disregarded the specified conditions of the Letter of Intent. The Proof of Claim further indicates that Stevens took affirmative steps to conceal the status and operation of the Allied accounts (Def. Ex. 5, p. 15).

It is elementary that before an employee's negligence will be imputed to his employer, the employee must be acting within the scope of his authority. *Ford* v. *Grand Union Co.*, 268 N.Y. 243 (1935); *see, e.g., Mauk* v. *Wright*, 367 F. Supp. 961, 966 (M.D. Pa. 1973). This is particularly true when one seeks to impute contributory negligence. *See Kalechman* v. *Drew Auto Rental, Inc.*, 33 N.Y.2d 397 (1973); *Brown* v. *Poritzky*, 30 N.Y.2d 289 (1972).

The doctrine of imputed contributory negligence should be stringently applied since this doctrine "is an illegitimate offspring of the vicarious liability concept, which only serves to frustrate the broad policy goals of the parent rule." *Kalechman* v. *Drew Auto Rental, Inc.*, 33 N.Y.2d at 403. The common law doctrine of imputation of liability was designed to expand the scope of liability, thereby facilitating recovery by an injured person. Imputation of contributory negligence serves exactly the opposite purpose and as such should be narrowly construed. *Kalechman* v. *Drew Auto Rental, Inc., supra.* This of course is particularly true in an area of national concern, where traditional common law tort doctrines should not be interposed as a bar to recovery. See pp. 85-86 *supra.*

Thus, assuming *arguendo* that Haupt's conduct could be a bar to the Trustee's recovery, it was incumbent upon the District Court to adequately instruct the jury on Stevens' scope of authority so that they could intelligently weigh the evidence and make an informed determination. This the Court did not do. Rather, the Court, while stating that the jury must find that the negligence of Haupt's officers or employees occurred while they were "acting within the scope of their employment" (JA 2116a), failed to define "scope of employment" and did not lay out the parties' respective contentions on this subject. No doubt this charge muddled the issue and thereby denied the jury the opportunity to fairly evaluate the evidence which had been presented on this matter. Since the Trustee was entitled to have the jury decide whether Stevens' conduct was within the scope of his employment and thereby attributable to Haupt in this action, the Court's charge was severely prejudicial (JA 2119a-20a).

Furthermore, when the District Court instructed the jury as to the applicable *legal standard* governing the case, it charged only that the defendants had the "initial" responsibility for maintaining orderly marketing conditions and did not instruct them to disregard the CEA's inaction in reaching their determination (JA 2112a, 2119a). This charge was erroneous.

As discussed above, the individual exchanges and not the CEA have the primary responsibility under the Act for maintaining an orderly market, free from manipulation (see pp. 28-31 *supra*). Defendants were required to monitor the market and to investigate unusual market activity. They could not simply ignore their responsibility and shift the burden to the CEA. If defendants chose to rely upon CEA inaction, they did so at their peril; and surely they were not entitled to have the jury weigh the CEA's inaction in their favor.

Prosecutorial and investigatory functions are discretionary. *See United States* v. *Jones,* 438 F.2d 461, 467-68 (7th Cir. 1971); *People* v. *Bunge Corp.,* 25 N.Y.2d 91 (1969). There are numerous reasons why the CEA may not have brought charges against DeAngelis during 1963: insufficiency of staff, insufficiency of funds and research facilities, erroneous interpretation of the law, or just plain neglect. Indeed, the OIG Report (Def. Ex. 211 id.) indicates that the CEA took a narrow and restrictive approach to its duties and was somewhat lax in performing its supervisory functions during 1963:

> Our audit disclosed that generally CEA did not perform with maximum effectiveness its regulatory functions and role of administering the act because of its conservative interpretation of the act and insufficient manpower. A conservative interpretation of the act has resulted in a passive rather than an active or

aggressive approach to regulatory control. OIG Report, p. 4.

The OIG Report indicates that the CEA did not sufficiently utilize the Act's enforcement provisions with the result that penalties were not exacted against some violators (p. 10). The OIG Report further concludes that "the resultant effects of CEA's operating with insufficient manpower has been that CEA policy (not necessarily in writing) has been, (1) to conduct investigations on a highly selective basis . . ." (p. 17). The CEA itself admitted that it lacked sufficient staff and appropriate financial resources. See Statement of George I. Mehren, Assistant Secretary of Agriculture, Hearings Before the Subcommittee of the Committee on Appropriations, H.R. 11202, 88th Cong., 2d Sess. 401-02 (1964). *See also J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964).

To allow the defense, in a private action under the securities and antitrust laws, to urge the inaction of the SEC or the Department of Justice in support of its position would contravene the important public policy of fostering suits, such as this one, by private attorneys general. There simply would be no need for such private lawsuits if governmental agencies always took full and effective action whenever the law is violated. *Cf. J.I. Case Co.* v. *Borak, supra* ("private enforcement of [§ 14(a) of the Securities Exchange Act of 1934] provides a necessary supplement to Commission action").

The CEA's inability to properly oversee the commodity markets was a strong factor in the creation of the CFTC in 1974 and necessitated the commencement of private enforcement actions such as this one. In the face of the conclusions set forth in the OIG and GAO Reports, defendants

can hardly argue that CEA inaction evidenced no wrongdoing and therefore no regulatory failure by them.

The CEA's inaction was not a proper issue for the jury to consider when weighing defendants' conduct. Since a jury would tend to give great weight to the views of an agency of the United States, not a party to the lawsuit, the Trial Court's failure to instruct the jury to disregard the evidence of CEA inaction was extremely prejudicial to the Trustee and constitutes reversible error.

POINT V

THE DISTRICT COURT ERRED IN DIRECTING A VERDICT IN FAVOR OF THE CORPORATE AND PARTNERSHIP DEFENDANTS

The trial judge granted defendants' motion for a directed verdict in favor of the corporate and partnership defendants, stating:

> I have come to a decision, and that decision is to dismiss the actions against the corporations.
>
> The basis for it, there is nothing in the record to establish that Mr. Fashena or Mr. Vogel or Mr. Klein or Mr. Anderson operated as members of the board of managers of the produce exchange and functioned on behalf of their various corporations or did any act on behalf of or with carrying out their policy. There's nothing in the record on that. So that action is dismissed (JA 1981a).

The dismissal of these claims was contrary to the weight of the evidence and greatly prejudiced the Trustee's position before the jury. Following the dismissal of the bad faith claims, the trial judge's ruling in favor of the corporate defendants destroyed the credibility of the Trustee's

case. The jury could not help but conclude that the District Court was not impressed by the Trustee's proof and their decision may well have been influenced thereby.

The Court's dismissal of the Trustee's claims against the corporate and partnership defendants was erroneous on two grounds: (1) the facts demonstrated that said defendants guaranteed the acts of their respective employees as members of the Produce Exchange, including service on the Board, and (2) the facts demonstrated that the acts and omissions of defendants Klein, Vogel, Anderson and Fashena were in furtherance of and within the scope of their employment.

A. *Continental, Bunge and Merrill Lynch Guaranteed the Acts of Their Respective Representatives*

On March 3, 1959, Vogel applied for membership on the Produce Exchange. In connection with Vogel's membership application, Continental executed a "Principal's Guarantee in Connection with Application for Membership" wherein Continental stated:

> we hereby guarantee the faithful performance of any contracts [Harold Vogel] may make in our name *and hold ourselves responsible for his acts as a member of the Exchange, during such time as he may remain in our employ* or until the Exchange shall be notified in writing that he is no longer employed by us and that we will no longer assume further responsibility for his acts *or* guarantee further contracts made by him (Pl. Ex. 208) (emphasis supplied).

Bunge supplied an identical guarantee in connection with Klein's application for membership (Pl. Ex. 200). Similarly, Merrill Lynch guaranteed all acts of Anderson as a member of the Produce Exchange (Pl. Ex. 204).

Since neither Klein, Vogel nor Anderson traded on the Produce Exchange (*see, e.g.,* JA 1417a, 1502a), there would be no point in their respective employers providing said guarantee unless it is construed to cover their actions as members of the Board and otherwise as Exchange officials. Therefore, Bunge, Continental and Merrill Lynch must stand behind the acts and omissions of Messrs. Klein, Vogel and Anderson respectively, including their failure to properly regulate the Produce Exchange during 1963.

B. *The Acts of the Individual Defendants as Members of the Board in 1963 Are, In Any Event, Attributable to Their Respective Firms*

Walter Klein was President of Bunge. There can be no doubt that his service on the Board of a commodity futures exchange on which his company actively traded futures contracts came well within the scope of his employment. Furthermore, Klein testified that he became a member of the Board as a representative of Bunge (JA 1375a); and that he replaced the prior Bunge representative on the Board when that representative retired (JA 1375a). When Klein could not attend the Board meeting of November 19, 1963, Richard Forti went to represent Bunge in his place. Finally, Klein stated in his application for membership on the Exchange that he intended to represent Bunge (Pl. Ex. 200).

Similarly, the failure of Anderson, Vogel and Fashena properly to regulate the Produce Exchange in 1963 must be attributable to their respective employers, given the executive capacity in which these men served their respective firms. Michel Fribourg, Continental's President, admitted that Vogel's service on the Board constituted at least a "minor duty" of his (JA 1612a-13a). Further,

Vogel's application clearly stated his intent to become a member of the Exchange "as officer of Continental Grain" (Pl. Ex. 208). Irving Hankin of Merrill Lynch testified that Anderson, head of the Merrill Lynch commodity department, handled the administrative arrangements and represented Merrill Lynch with the various commodity exchanges (JA 1278a; *see also* Anderson 9-G Statement [R. 348, pp. 28-29]). Fashena testified that he became a member of the Board because he "was a small trader representing a small trading firm" (JA 896a-97a). Usiskin was a firm whose primary business was futures trading and Fashena's position on the Board was not unexpected to the partnership (JA 896a-97a).

General agency principles make it clear that an individual defendant's liability may be imputed to his firm if the actions or inactions from which his liability flows were within the scope of this authority. *Egan* v. *United States,* 137 F.2d 369, 379 (8th Cir. 1943), *cert. denied,* 320 U.S. 788 (1943); RESTATEMENT (SECOND) OF AGENCY §§ 216, 219, 228-32, 236; N.Y. PARTNERSHIP LAW §§ 20, 22, 23, 24 (McKinney 1948). Further, the Produce Exchange was, in 1963, an organized regulatory body with power to exercise firm control over its members and the cottonseed oil futures market; and the nature of the relationship between the Produce Exchange and defendants Bunge, Usiskin, Continental and Merrill Lynch justifies the finding that the participation of executives of these firms in its management and the committee structure was an integral part of the employment of these executives in the industry.* *Seligson* v. *New York Produce Exchange,* 378 F. Supp.

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* *See, e.g.,* Pl. Exs. 187, 188, 189, 190 (summary charts which list the extensive participation of the respective partners, officers and employees of said companies in the management and committee structure of the Produce Exchange during 1963).

1076, 1089 (S.D.N.Y. 1974); *Vandervelde* v. *Put & Call Brokers and Dealers Ass'n,* 344 F. Supp. 118, 156 (S.D. N.Y. 1972). Moreover, as in the case of the company defendants in *Vandervelde,* Bunge, Usiskin, Continental and Merrill Lynch in this action most assuredly had a direct interest in the subject matter of the controversy. Indeed, as shown above, the defendant companies profited as a result of the actions and failures to act of their representatives on the Produce Exchange Board (see pp. 22-28, 31-43 *supra*).

In sum, the nature of the industry, the guarantee provided by the corporations and partnerships involved, the foreseeability to these firms that their partners or their top ranking officers would accept such industry-related positions and the statements of intent filed by these officers with the Produce Exchange compel the conclusion that the acts or omissions of the individual defendants were taken in furtherance of their employment with their respective firms, and that the latter are liable for the misconduct of the former. *Feder* v. *Martin Marietta Corp.,* 406 F.2d 260 (2d Cir. 1969), *cert. denied,* 396 U.S. 1036 (1970), *citing Blau* v. *Lehman,* 368 U.S. 403 (1962); *Egan* v. *United States, supra; Seligson* v. *New York Produce Exchange, supra; Vandervelde* v. *Put & Call Brokers and Dealers Ass'n, supra.* The refusal of the District Court to allow the jury to pass on the question was prejudicial error.

CONCLUSION

As detailed above, the verdicts directed by the District Court, and its many erroneous rulings and instructions surgically dismembered the Trustee's case. The Trustee's ability to present to the jury the full picture of what occurred during 1963, and the jury's ability to consider all the facts, was seriously impaired.

Not only did the trial judge eviscerate plaintiff's case when he directed a verdict for the defendant trader-regulators on the issue of bad faith; he also excluded highly relevant and probative evidence on the bad faith issue, as well as excluded a further demonstration that Allied's activities constituted a manipulation and a threat to orderly marketing on the Produce Exchange. Unbelievably, the Court admitted into evidence an unsigned, undated report of unknown authorship filled with unsupported, highly debatable—and extremely prejudicial—opinions on the very question indicated by the Court as the *sine qua non* of the Trustee's case. Finally, the Court improperly charged the jury with respect to the circumstances under which liability could be imposed, thereby effectively precluding the jury from finding for the Trustee.

Individually, each of the Court's erroneous rulings severely prejudiced the Trustee's case; taken together they destroyed it. Accordingly, the Trustee was denied a fair trial.

As a result of all of the foregoing, the Trustee is clearly entitled to a new trial, and the judgment below should be reversed in all respects.

Dated: New York, New York,
March 2[illegible], 1976.

Respectfully submitted,

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APPENDIX

APPENDIX I

The Futures Market

During 1963 the Produce Exchange and the Board of Trade were self-regulated contract markets, so designated by the Secretary of Agriculture, on which contracts for the purchase and sale of commodities to be delivered on specified dates in the future ("futures") were traded (Pl. Ex. 9e, p. 1).

Cottonseed oil futures contracts constituted the substantial bulk of all futures traded on the Produce Exchange during 1963 (JA 487a). Soybean oil futures were traded on the Board of Trade, the nation's largest commodity exchange.*

Futures trading should be distinguished from ordinary commercial, or "cash" trading. In a cash transaction the purchaser actually receives the physical or cash commodity in exchange for the entire purchase price. A cash transaction can either be a present transfer or an agreement between specific individuals to transfer the cash commodity at a fixed date in the future. In such a transaction the cash crop is consumed, exported, or otherwise disposed of by the purchaser (JA 195a-96a).

On the other hand, a futures contract is an agreement between a seller (a "short") and a buyer (a "long") to

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* For most commercial purposes cottonseed oil and soybean oil are interchangeable products and generally are part of a group of oils denominated "vegetable oils". Because of the interrelationship between the two oils, a person who traded in one market often traded in the other.

Historically, cottonseed oil has sold at a premium over soybean oil due to, among other reasons, the fact that cottonseed oil is sold in a more refined state than soybean oil. The prices of these two oils moved in parallel fashion at all times (JA 671a).

transfer a specific quantity and quality of a specific commodity at a negotiated price during an identified month in the future (JA 194a, 203a). The principal terms of a futures contract are prescribed or limited by the exchange rules. For example, Rule 1 of the Rules Regulating Transactions in Cottonseed Oil Futures Contracts ("Rules") (Pl. Ex. 56) provided that each cottonseed oil futures contract traded on the Produce Exchange during 1963 required delivery of 60,000 pounds (the equivalent of one railroad tank car) of Prime Bleachable Summer Yellow Cottonseed Oil. Rule 2 specified delivery points and freight adjustments. Rule 23 limited daily price fluctuations to a range of 2 cents per pound.

Futures contracts are bought and sold on the trading floor of an organized exchange (JA 196a) by a floor broker, who may buy or sell futures for others or for his own account, and who receives commissions based on the number of contracts so purchased or sold (JA 200a-01a).

Except under certain limited exceptions, trading must take place on the floor of the exchange (in the "pit" or ring) where prices can be determined by an auction process of public outcry. Under limited circumstances, the exchange rules permit trading off-the-floor of the exchange (JA 224a-25a).* In these private or "ex-pit" trades, prices

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* During 1963, Rule 6 (Pl. Ex. 56) required that:

> [a]ll orders for the purchase or sale for future delivery of any commodity dealt in on [the Produce] Exchange . . . be . . . executed in good faith by an actual bona fide transaction entered into at public outcry at the trading ring provided for that purpose on the Exchange Floor and at a price against which all members present at the trading ring shall have had an opportunity to bid or offer, and during such hours as shall have been designated for trading in such commodity.

(*footnote continued*)

an opposite position in the futures market, *i.e.,* he can go "short" and become the seller of an equivalent number of futures contracts. Thereafter if the price of the trader's cash oil declines, the value of his "short" futures position will increase. The loss incurred in the liquidation of his cash oil position will be offset by the profits realized on the corresponding liquidation of his futures position. On the other hand, a trader who has an obligation to sell a quantity of cash commodity which he does not yet own (and is thus "short" in the cash commodity) can obtain similar protection by taking a "long" futures position, *i.e.,* buying futures contracts (JA 197a-99a, 204a-08a).

Futures may also be traded for purely speculative purposes. A speculator in futures has no offsetting position in the cash commodity; he buys or sells a futures contract solely in the hope of profiting on the basis of his prediction of market price movements (JA 208a-09a).

As previously mentioned, futures contracts call for delivery to be made during a specific month in the future.* Nonetheless, it is unusual for traders holding a long futures position to actually take delivery of the commodity; or for a short to deliver the cash product. Most futures contracts are liquidated or closed out by taking an offsetting long or short position (JA 219a). Thus, for example, a short would offset his contract to deliver oil in July by acquiring a second contract to take delivery of oil in July. The obligations being equal and opposite, they are deemed to be "offset" or cancelled. Since this method of fulfilling a fu-

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* The delivery date is specified by the rules of each exchange and relates to the futures month specified in the contract. In 1963, the contract months traded on the Produce Exchange were: March, May, July, September, October and December (JA 202a).

tures contract generally entails less expense, actual delivery rarely occurs.*

Where delivery did occur, a seller initiated the delivery procedure by informing the Clearing Association and the Produce Exchange of his intent to deliver. The Clearing Association then contacted the holder of the oldest long position. At that time the long either could "stand for delivery" or offset his position by selling an equivalent number of futures contracts. If the oldest long chose to offset his position, then the Clearing Association would tender the commodity to the next oldest long and so forth until someone agreed to stand for delivery (JA 223a-24a).

Delivery did not entail physical transfer of the actual cash commodity—rather there was an exchange of documents (JA 224a). In the case of cottonseed oil on the Produce Exchange, registered warehouse receipts for Prime Bleachable Summer Yellow Cottonseed Oil were transferred from the short to the long (Pl. Ex. 56, Rules 1 and 2).

A warehouse receipt is a document signifying ownership of a specified quantity of a commodity of specific grade located at a specific storage site. The receipt is issued by the person or firm that is charged with the safekeeping of the commodity. Warehouse receipts may be registered for

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* Futures prices generally move up and down together with prices of the cash commodity. The relationship between futures and cash prices reflects the costs of storage, insurance and related expenses which are built into the futures price. As the delivery period approaches, the cash and futures prices tend to come together inasmuch as storage and insurance expenses are reduced proportionate to the time period remaining prior to delivery (JA 219a-23a). Nonetheless, some differential will still exist, and together with the costs and fees associated with taking delivery on the futures market (Pl. Ex. 56, Rule 51), which do not exist in the cash market, these differences make it more expensive under normal circumstances to use the futures market as a source for the cash commodity.

delivery on an exchange or they may be field receipts. Registered warehouse receipts are those issued by warehouses which are licensed by the exchange on which the commodity evidenced by the receipt is traded (JA 224a); such licensing establishes that the warehouse has been inspected by the exchange and that it meets the exchange's standards, financial and otherwise. Registered receipts may be delivered on the exchange by which they are registered in settlement of futures transactions (JA 224a).

Non-registered field warehouse receipts are those issued by a warehouse not licensed by an exchange nor subject to the exchange's requirements. Such receipts cannot be tendered on an exchange. They nevertheless can be used as collateral for loans. It was such non-registered warehouse receipts that Allied caused to be issued covering nonexistent oil in the Harbor Tank incident and thereafter.

APPENDIX II

The Ex-Pit Loans

During 1963 Allied was poised on the precipice of financial disaster (see pp. 10-12 *supra*). Allied had more oil than it needed for its customers; and not enough oil to collateralize its loan obligations. Moreover, since Allied had borrowed so extensively, it could not afford to let the price of vegetable oil decline, for this would cause its lenders to demand increased collateral and its brokers to demand increased margin. Allied knew it could not meet these demands (JA 1061a-64a). Allied therefore became a heavy speculative buyer in the cottonseed oil futures market in an attempt to shore up the value of its inventory (JA 1051a-56a, 1668a-70a, 1673a).

DeAngelis quickly became caught up in a web of his own making. Thus, as each delivery month approached, DeAngelis faced a difficult choice: he could either sell off his long futures position, which would cause the market price of oil to fall (JA 1674a), or he could stand for delivery on his long futures position, thereby increasing his cash oil inventory even further (JA 1050a-51a, 1061a-62a, 1779a-81a). While this latter course would support oil prices (JA 1050a-51a, 1061a-62a, 1779a-81a),* Allied could ill afford to do this.

In order to stand for delivery, Allied was required to pay in full for the oil represented by these warehouse receipts (Pl. Ex. 56, Rule 49). Since Allied could not afford and did

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* Standing for delivery increased prices in two ways: first, it created the appearance of a demand for oil at the high price of the futures contract; and second, it had the effect of keeping the registered oil represented by the warehouse receipts "off the market," thereby reducing the deliverable supply of oil and tending to force prices higher (JA 1779a-81a, 1663a-65a).

not need the oil represented by these receipts for its business, DeAngelis devised an ex-pit financing scheme in an attempt to bootstrap himself out of his financial embarrassment. This ex-pit scheme took the following form and had the following effect:

1. As early as February, 1963 DeAngelis arranged for loans to be made to Allied in the guise of a sale of registered warehouse receipts by Allied to a lender such as Bunge (Pl. Ex. 93; JA 1078a-79a). Allied had a similar arrangement with Continental (JA 1039a).

2. DeAngelis pledged the registered receipts to Allied's lenders as security for the loans (JA 1039a, 1078a-79a).

3. DeAngelis insured his lenders against risk of loss (JA 1075a, 1080a, 1135a-36a) by engaging in a simultaneous ex-pit futures trade whereby Allied would go long, and its lender short, a number of futures contracts equal to the number of registered warehouse receipts involved in the loan. Because Rule 6-B of the Produce Exchange permitted ex-pit trading only in connection with a cash sale of oil between the parties (Pl. Ex. 56), Allied and its lenders engaged in a charad whereby the pledge of such warehouse receipts by Allied w. alled a "sale", despite the fact that Allied agreed to repay the loan and take back the receipts prior to the next delivery month. These ex-pit trades were then reported to the Produce Exchange by the clearing members for each side as involving an actual change of ownership of cash oil.*

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* Continental cleared its own trades; Bunge's trades were cleared by Merrill Lynch (see Pl. Exs. 62 and 193).

Since these "sales" were in actuality financing transactions, there was no underlying sale of cash oil to justify the ex-pit trade

(*footnote continued*)

4. These ex-pit transactions reduced the deliverable supply of oil which Allied could be forced to accept if it stood for delivery by taking registered warehouse receipts off the market and placing them in the hands of lenders as loan collateral (JA 1663a-64a).

5. Pursuant to the prearranged understanding with its lenders (JA 11[illegible]a-38a, 1144a, 1659a, 1661a), Allied would engage in a subsequent ex-pit transaction prior to the delivery date of the futures contract involved in the original ex-pit. In this second transaction, Allied would repay the loan by "repurchasing" the registered warehouse receipt collateral. Simultaueously, Allied would sell an offsetting futures contract to its lender, thereby cancelling out the futures positions of both debtor and lender. The warehouse receipts would then be returned to Allied in completion of this "round-trip" transaction (JA 1067a-68a, 1126a, 1137a-38a, 1144a, 1153a).*

6. On a number of occasions, Allied did not have sufficient funds to repay these loans when they came due.

(*footnote continued*)

as required by Rule 6-B. Consequently, as Professor Gray testified, the ex-pit trades in which Allied engaged during 1963 as part of its registered warehouse financing scheme were not bona fide cash transactions and thus did not fall within the purpose and scope of Rule 6-B (JA 1657a-59a, 1662a, 1667a).

* Karl Groeneveld, the senior traffic manager of Bunge's Oil Department (JA 1426a-27a) testified that there were about 40 ex-pit transactions involving registered warehouse receipts between Bunge and Allied during 1963 (JA 1431a). Mr. Groeneveld, explaining the round-trip nature of these transactions, testified:

> When we bought from Allied these warehouse certificates, we sold futures. When we sold the warehouse certificates, we bought futures (JA 1428a).

(*footnote continued*)

Allied then either pledged the warehouse receipts to another exporter who would pay the previous lender (Pl. Exs. 234, 235) and take over both Allied's debt and the warehouse receipt collateral, accompanied by a new ex-pit trade (JA 1063a-66a, 1068a), or Allied would simply "roll-over" the loan with the same lender in a further series of ex-pit transactions. On such a "rollover", Allied would first "repurchase" the warehouse receipt collateral and sell futures to offset its long futures position; and simultaneously would resell the receipts and buy back a corresponding long futures position. In this manner, Allied extended its loan into a more distant month.*

(footnote continued)

Continuing, Groeneveld stated:

> the futures transaction, of course, as in this case—a complete round-robin futures transaction had either a profit or a loss (JA 1429a).

The formula applied to these transactions demonstrates that both Bunge and Allied treated them as disguised guaranteed loans rather than as true sales of cash oil. While Bunge, by way of example, might sustain a paper loss of 29 points (29/100 cents per pound) on an initial sale of futures to Allied (JA 1429a), this "loss" would merely be treated as a Bunge expense to be covered by Allied upon completion of the round-robin deal. In calculating Bunge's expenses, Groeneveld would take into account a brokerage commission of 9/100 cents per pound; storage costs from the time Bunge "purchased" warehouse receipts to the final day on which delivery could be taken on the offsetting futures contract, and interest for the interim time period. To the foregoing, Groeneveld would add back the 29/100 cents per pound loss sustained on the "first leg" of the round-robin futures transaction. The round trip was completed by Bunge "reselling" the warehouse receipts back to Allied and cancelling out its short futures position. Upon completion of the round trip, all of Bunge's costs and profit on the entire transaction would be paid by Allied (JA 1430a-31a; *see also* Pl. Ex. 166).

A similar formula was used in the Continental-Allied ex-pit registered warehouse receipt transactions (JA 1039a-47a, 1667a-68a, 1718a-21a).

* Not surprisingly, this charade is made more apparent by the fact that Allied and its lenders never even went through the ritual of transferring the warehouse receipts back and forth. For ex-

(footnote continued)

In sum, these transactions, which allowed Allied to stand for delivery when it had no legitimate business need for oil and did not have the independent financial resources to pay for it, enabled Allied to maintain and increase its long futures position and thereby to artificially support the price of vegetable oil futures (JA 1051a, 1780a-81a). In addition, the contracts acquired by Allied pursuant to this scheme lacked integrity since they did not reflect a legitimate demand for oil. Further, the "roll-over" transactions had a churning effect on the market by giving an artificial appearance of increased volume of trading, which also tended to support the price of futures.* Since both the intent and the effect of these transactions was to inflate and support artificially high futures prices, these transactions were manipulative (JA 1669a-71a, 1780a-81a).

(footnote continued)

ample, Continental's Assistant Treasurer, Ferretti, testified that in one roll-over transaction involving 516 registered warehouse receipts, the receipts *never left* Continental's possession (JA 1558a). Even Continental's own file records show this as a "wash" (Pl. Exs. 255c, 255d).

* For example, 500 contracts involved in two ex-pit transactions comprising a "rollover" would be reported as trades involving 1,000 futures contracts and equivalent amounts of cash oil. In fact, however, no cash oil would actually change hands, and an artificial picture of market activity and market interest would thereby be created.

APPENDIX III

Pertinent Portions of Statutes, By-Laws and Rules Relating to the Determination of the Issues Presented

Commodity Exchange Act, In Effect Through November 20, 1963

7 U.S.C. §5:

Transactions in commodity involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest; such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodity and the products and by-products thereof in interstate commerce; the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodity and the products and by-products thereof and to facilitate the movements thereof in interstate commerce; such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodity and the products and by-products thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and by-products

thereof in interstate commerce, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and by-products thereof and render regulation imperative for the protection of such commerce and the national public interest therein.

7 U.S.C. §7:

The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

* * *

(d) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

The Sherman Act, In Effect Through November 20, 1963

15 U.S.C. §1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

New York Produce Exchange By-Laws In Effect Through November 20, 1963 (Pl. Ex. 55)

§61.

The Committee on Business Conduct shall consist of seven members, two of whom shall be members of the Board and one Chairman of the Committee. It shall be the duty of this Committee to consider matters relating to the business conduct of members. It shall have power to examine into the dealings and general conduct of members and report its findings to the Board.

It shall have power to summon witnesses for the purpose of examining and investigating the dealings, transactions, financial condition and general conduct of members, to subpoena and examine their books and papers, and to call upon them for audited statements of their financial condition in connection therewith, as the Committee in its discretion may consider advisable. The Committee shall have power to consider matters relating to the business conduct and financial condition of members and their customers' accounts; *and to observe the course of transactions on the Exchange in order to determine whether resort is being had to improper transactions.* (Emphasis added)

* * *

§67(a). (Also effective as Rule 9 [Pl. Ex. 56])

The Board of Managers shall have full power and authority at any time and from time to time, by resolution adopted by a majority of the whole Board, to make, determine, fix, alter, vary and change the rules regulating purchases and sales of, and general trading in, any commodity futures dealt in on the floor of the Exchange, including, without limiting the generality of the foregoing, the power and

authority to require the furnishing of information by the members and to make investigations on all transactions in commodity futures and to subpoena records and to alter or abolish credits which may be given, and to increase or decrease margin requirements in futures transactions and to prohibit futures transactions in any commodity, anything contained in the rules and regulations governing transactions in any commodity futures on the floor of the Exchange, as now existing or as hereafter changed or amended, to the contrary notwithstanding.

* * *

§68.

* * *

No member shall manipulate or attempt to manipulate prices of commodities or corner or attempt to corner any commodity, and any member who shall knowingly or intentionally violate the provisions of this Section shall be suspended or expelled at the discretion of the Board of Managers.

The Board of Managers is authorized to take such other steps as may be necessary or advisable to make effective sub-divisions (c) and (d) of Section 5 of the Commodity Exchange Act.

* * *

In order to comply with the Act of Congress known as the Commodity Exchange Act, it is hereby provided that all rules of this Exchange shall be construed with reference to, and shall be deemed subject to, and modified by, the provisions of said Act.

* * *

Rules Regulating Transactions in Cottonseed Oil Futures Contracts Among Members of the New York Produce Exchange, As Amended up to and Including November 20, 1963 (Pl. Ex. 56)

Rule 1. THE FORM OF CONTRACT

All offers to buy or sell shall be presumed to have been made in the following form:

.... of the county of .... State of .... have this day (bought from; sold to) .... and agreed to (receive from; deliver to) .... of the county of .... State of .... 60,000 pounds of loose Prime Bleachable Summer Yellow Cottonseed Oil, at a price of .... cents and .... hundredths cents per pound, in licensed bonded warehouse basis f.o.b. New York; deliverable between the first and last delivery days of .... inclusive, at seller's option. The oil dealt with herein shall be Prime Bleachable Summer Yellow Cottonseed Oil; shall be of American origin and produced within the United States of America, and must be clear, free from water and settlings, sweet in flavor and odor, and when bleached, as per rules governing the Chemistry Bureau, the color of the oil to be passed upon shall not be darker than the combined standard glasses 25 Yellow, 2.5 Red of Lovibond's color scale, and shall not contain more than one-quarter of one per cent free fatty acids.

This agreement is made subject to all of the By-Laws, rules and customs of the New York Produce Exchange.

RULE 3. (Also effective as part of Sec. 68 of the By-Laws)

In order to comply with the Act of Congress known as the Commodity Exchange Act, it is hereby provided that all rules of this Exchange shall be construed with reference to, and shall be deemed subject to, and modified by, the provisions of said Act.

RULE 4. (Also effective as Sec. 67 of the By-Laws)

The Exchange and its members shall comply with the provisions of the Commodity Exchange Act, when the same are applicable, and with the rules, regulations and orders thereunder that may be lawfully made and promulgated by the Secretary of Agriculture or the Commodity Exchange Commission to effectuate any of the provisions or to accomplish any of the purposes of said Act.

RULE 5. (Also effective as Sec. 68 of the By-Laws)

* * *

No member shall manipulate or attempt to manipulate prices of commodities or corner or attempt to corner any commodity, and any member who shall knowingly or intentionally violate the provisions of this section shall be suspended or expelled at the discretion of the Board of Managers.

The Board of Managers is authorized to take such other steps as may be necessary or advisable to make effective sub-divisions (c) and (d) of Section 5 of the Commodity Exchange Act.

* * *

RULE 6. (Also effective as Sec. 66 of the By-Laws)

All orders for the purchase or sale for future delivery of any commodity dealt in on this Exchange, in order to be incorporated in and recorded upon the reporting mechanism of the Exchange, must be (unless specifically excepted in paragraphs (a) and (b) hereof) executed in good faith by an actual bona fide transaction entered into at public outcry at the trading ring provided for that purpose on the Exchange Floor and at a price against which all members present at the trading ring shall have had an opportunity to bid or offer, and during such hours as shall have been designated for trading in such commodity.

EX-RING TRADES

Exceptions:

(a) Transfers of open contracts involving no change in ownership.

*(b) Trades made in connection with cash fats, oils and oilseeds transactions or exchanges of futures contracts for cash fats, oils and oilseeds.

**All such transactions shall be reported and recorded during market hours on the day the transactions are to be cleared. Any such transaction entered into after the close of the market shall be reported, recorded and cleared on the following business day.

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* Amended 11/1/62.

** Amended 9/24/63.

Rule 6 (continued)

Reporting of Ex-Ring Trades

*Any futures transactions or transfers if not executed as hereinbefore provided and recorded in the daily quotation record of the Exchange, must be reported to the Secretary of the Exchange by both the buyer and seller, in writing, giving the name of the opposite party, the number of contracts involved and the months and prices thereof. Where trades are made pursuant to the provisions of paragraph (b) hereof or Rule 22, the report, in addition, shall include the kind and quantity of the cash commodity involved and a complete description of the documents exchanged, such as the warehouse receipts, bills of lading or the cash contracts representing the cash commodity. The information so reported to the Secretary shall be available to only the Board of Managers and such Committee or Committees as may be designated by the Board to have access thereto for such use as the Board or the designated Committee or Committees may elect.

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* Amended 11/1/62.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt,	:	
Plaintiff,	:	**AFFIDAVIT OF SERVICE**
-against-	:	Docket No. 75 - 5024
NEW YORK PRODUCE EXCHANGE, et al.,	:	
Defendants.	:	

-------------------------------------x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Harold Bonacquist being duly sworn, deposes and says that he is over the age of eighteen; that he is employed by Weil, Gotshal & Manges, the attorneys for Plaintiff in the above-entitled action; that on the 9th day of August, 1976, he served the Appellant's Brief on each of the persons hereinafter mentioned by depositing two true copies thereof securely enclosed in a post-paid wrapper in the Official Depository maintained and exclusively controlled by the United States Government in the City and State of New York, directed to the persons hereinafter named at their respective office and post office addresses within the State designated by them for that purpose:

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and Walter C. Klein
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Sworn to before me this
9th day of August, 1976

Notary Public

ROBERT F. BRODEGAARD
Notary Public, State of New York
No. 31-4626680
Qualified in New York County
Commission Expires March 30, 1978

Harold Bonacquist

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

☐ Attorney's Certification: certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation: say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Check Applicable Box

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.
Dated:

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

☐ Individual Verification: in the action herein: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification: the of a corporation, one of the parties to the action: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

Check Applicable Box

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 19

(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 19 , I served a true copy of the annexed in the following manner:

☐ Service By Mail: by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

☐ Personal Service: by delivering the same personally to the persons and at the addresses indicated below:

Check Applicable Box

Sworn to before me on , 19

(Print signer's name below signature)

Index No. *Year 19*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt,

Plaintiff,

-against-

NEW YORK PRODUCE EXCHANGE, et al.,

Defendants.

AFFIDAVIT OF SERVICE

WEIL, GOTSHAL & MANGES
Attorneys for Plaintiff

767 FIFTH AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022
(212) 758-7800

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* *19*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on* *19* *, at* *M.*

Dated:

WEIL, GOTSHAL & MANGES
Attorneys for

767 FIFTH AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022

To:

Attorney(s) for